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IN
THE FUTURE INDIAN FEDERATION

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DISTRIBUTION OF LEGISLATIVE POWERS
IN
THE FUTURE INDIAN FEDERATION

BY
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WITH A FOREWORD
BY
THE RIGHT HON'BLE VISCOUNT SANKEY
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TO

MY MOTHER

LADY GUNDAMMA KRISHNA RAU

FOREWORD

THE task of framing a system of government for India calls for a profound knowledge of her past history and her present conditions of and outlook on life. It further calls for a sympathetic understanding of her needs and aspirations and a statesmanlike consideration of her many difficult and embarrassing problems. In these circumstances the greatest service a lawyer can render is to point out the failures or successes of other constitutions and the reason for such failures and successes. A lawyer, also, when an agreement on particular points has been reached should see that such agreement is put into language which is plain and not likely to lead to further disputes and divergences of opinion.

I am glad, therefore, that a distinguished member of my own profession, Mr. Ramaswamy, has written this book, which is a very useful contribution to a very difficult situation. In it he states quite clearly what his own opinion is. He says in his summing up, 'I can think of no form of political organization more suited to India than a Federation. It is the only technique I know of by which national unity and regional autonomy can both be safeguarded by a process of adjustment'.

His book is well thought out and well documented. It is not for me to express any opinion on his conclusions. Such a criticism is not necessary, nor would it be proper in a Foreword which draws attention to the legal side of the matter only. The value of the book is that it will make people think and enable them to form a judgment on his proposals.

Its scheme is carefully and conveniently set out. Chapter I deals with the Indian Federation in the light of other federations and Chapter II with the distribution of powers between the centre and the units. It cannot be denied that the Federal

Constitution of India embodied in the Government of India Act 1935 has not received complete assent, but at any rate it has familiarised the mind of thinking India with the conception of a united India on the lines suggested.

The first chapter draws attention to the Federal Schemes of Australia, Canada and the United States, which no doubt contain valuable suggestions. Any Indian Scheme, however, would have to be on a much extended scale. The population of Australia, Canada and the United States when their schemes came into being was infinitely smaller than the population of India and far more homogeneous. India has a population of over 380 millions, has many different races, many different religions, many different outlooks on life, and one of the most ancient civilisations in the world. Possibly it is hardly to be expected that any scheme for India can be accomplished by any other method than that of trial and error.

In his second chapter Mr. Ramaswamy deals with the central problem in the framing of a Federation Constitution, viz. that of the allocation of powers between the Federation and the constituent units. This is always a matter of extreme difficulty.

Those who have followed the decisions of the Privy Council on a similar topic in the British North America Act, 1867, which by Section 91 provides for the powers of the Dominion Parliament and section 92 the exclusive powers of the Provincial Legislatures, will appreciate the magnitude of the problem and the refinement of interpretation which has been applied to the various provisions. This topic has been admirably dealt with in the second chapter, which rightly begins by referring to certain basic problems connected with the establishment of a Federation in India. Mr. Ramaswamy suggests that with respect to the allocation of powers, India should follow the example of Australia, and he has sketched his own plan of the allocation of powers between the Federation and the units in the future Constitution of India.

Any criticism of his plan is not advisable in view of the fact that conditions in India are changing fast, and many present views may need re-consideration.

In placing this well-reasoned book before the public its author has done a valuable service to the country which will be appreciated by all those who take an interest in India's welfare.

SANKEY.

LONDON,
May 1943.

PREFACE

A SATISFACTORY solution for the Indian constitutional problem is long overdue. While the task of framing a Constitution for India may have to be postponed till after the conclusion of the War, it is time, I think, for all those interested in the welfare of the country to prepare the ground upon which the new constitutional edifice should be built. The problem presents various aspects, many of which require serious thought and consideration. In this book, I have endeavoured to study one aspect of it—perhaps the most difficult and important of all—namely, the allocation of powers between the federal centre and the constituent units.

There is no workable constitutional device that I know of which can properly harmonize national unity and regional autonomy other than a federal system. There are the classical examples of the United States, Canada, Australia and Switzerland, which have found happiness and prosperity under a federal dispensation. There is still, I think, an imperfect recognition of the immeasurable service which the federal technique has rendered in giving peace, contentment and happiness to large communities, in various parts of the world. I should ardently hope that the example set by these great federal unions will be more widely adopted, and that the post-war world will see the establishment of more such unions.

This book proceeds upon the basis that the future Constitution of India should be constructed upon the federal model, the constituent units of the federation enjoying a wide measure of local autonomy consistent with the maintenance of a reasonably strong government at the centre. I have explained in the body of this work the reasons which have impelled me to recommend that the future Indian Federal Centre should be

given a batch of specific powers, the residuary control being vested in the units themselves. Proceeding upon this basis, I have endeavoured to draw up a list of the powers with which the Centre should be equipped. In preparing this list, I have drawn upon the experience of the three great English-speaking Federations of the world, namely, The United States, Australia and Canada. The working of these federations has brought to the surface, particularly in the light of judicial interpretations, several important practical difficulties; and I have tried, in the framing of my federal list of subjects, to provide concrete solutions for such difficulties. I may also mention that, while I have made use of the experience of other federations, I have steadily kept in view the paramount consideration that the constitutional arrangements suggested should satisfy our needs and harmonize with our conditions.

The Right Hon'ble Viscount Sankey has done me the honour of contributing a foreword to this book. I cannot be sufficiently grateful to His Lordship for the kindness which he has shown me; and I am deeply in his debt for this favour.

M. RAMASWAMY.

BASAVANGUDI,
Bangalore City.
January 15, 1944.

CONTENTS

PAGE

FOREWORD vii

PREFACE xi

CHAPTER I.—THE INDIAN FEDERATION IN THE LIGHT OF OTHER FEDERATIONS 1

Introductory—The Plan of Distribution under the Government of India Act, 1935—The Australian Plan of allocation of powers—Advantages of a single list—The mistaken impression that the vesting of residuary powers in the units affects the strength of the Federation—How the impression came to be formed—The Dominion residuary power under the Canadian Constitution—Canadian experience summed up—The Central Governments under the United States and Australian Constitutions—The position of the Commonwealth Government under the Australian Constitution—The position of the Federal Government under the United States Constitution—How legislative powers should be distributed in the future Constitution of India

CHAPTER II—DISTRIBUTION OF POWERS BETWEEN THE CENTRE AND THE UNITS 31

Introductory—Certain Basic problems connected with the establishment of a Federation in India—A single federal list arranged into two groups—Defence and External Affairs—Industry, Trade and Commerce—Transport and Communication—Finance and Taxation—Subjects upon which uniformity of legislation is desirable—Labour—Miscellaneous—Control of Famine—Delegation of Legislative Powers—The Residuary Powers of the Constituent Units—Summing Up

INDEX... 75

TABLE OF CASES 78

CHAPTER I

THE INDIAN FEDERATION IN THE LIGHT OF OTHER FEDERATIONS

I

Introductory

In the allocation of legislative powers as between the federal government and the constituent units, it is possible to adopt one of two courses. The Constitution might either allot specific subject matters to the centre leaving all else to the units, or it might enumerate the powers of the constituent units giving the residue over to the centre. Both the United States and Australian Constitutions have adopted the former course. My suggestion is that, in the future constitution of India, it would be well for us to follow the American and Australian precedents in this respect. The future central government of India might be entrusted with a batch of specific powers leaving the residue of authority in the constituent units themselves. And in support of this suggestion I would urge the following five important reasons. Firstly, such a method of allocation would be an improvement in point of simplicity over the scheme of allocation of legislative powers adopted in the Government of India Act, 1935, which, as I shall be able to point out later, is of the most complex character. Secondly, both the British Indian Provinces and the Indian States would be placed on an identical basis in the matter of partition of legislative powers, as there will be only one federal list of subjects to deal with in both cases, the residuary powers remaining vested in the constituent units, without any distinction being made in this

respect between a province and a state. Though the residuary authority will vest in the provinces and states, it must be borne in mind that the range of authority exercisable by the federal centre over the provinces and states may not be the same even under the future constitutional arrangements, as the states may have to be permitted to retain jurisdiction over certain matters, which, in the case of the provinces would come under federal control. Thirdly, it will go a long way to satisfy Muslim opinion which is very insistent that the constituent units should be allowed to have residuary control, the centre being given only specific powers. Fourthly, it is possible to draw up a list of federal subjects which, while permitting the largest measure of autonomy to the constituent units, would, nevertheless, enable the central government to deal effectively with problems of national concern. And fifthly, and lastly, I think I will be able to show in the light of the lessons to be drawn from the working of the Federations of the United States, Australia and Canada, the commonly prevalent notion that the mere vesting of the residuary field in the constituent units would necessarily result in making the centre weak and helpless in the face of national crises proceeds upon a misapprehension of the facts and is not borne out by the experience of those federations. The points which I have mentioned above require to be elaborated. And to this task I address myself in the paragraphs that follow.

II

The Plan of Distribution

Under the Government of India Act, 1935

In deciding upon the plan upon which the distribution of legislative powers should be made, it must be pointed out that the framers of the India Act, 1935, had no free hand. A plan less complicated than the one now followed in that enactment

would very probably have been adopted but for the sharp cleavage of opinion that existed among the Hindu and Muslim delegates that attended the various Round Table Conferences in regard to the vesting of the residual powers. As Sir Samuel Hoare, the Secretary of State for India, pointed out at the committee stage of the India Bill: 'If it had been possible to have one list we should have been glad, but unfortunately, as in many of these Indian problems, when we came to apply to the actual facts what we desired, we found it to be impossible. We found that Indian opinion was very definitely divided between, speaking generally, the Hindus who wish to keep the predominant power in the Centre, and the Moslems who wish to keep the predominant power in the Provinces. The extent of that feeling made each of these communities look with the greatest suspicion at the residuary field, the Hindus demanding that the residuary field should remain with the Centre and the moslems equally strongly demanding that the residuary field should remain with the Provinces . . . We tried year after year, not only in the Joint Select Committee but also in the various Round Table Conferences, to bridge the difference, but the only bridge that we could find between these two diametrically opposite points of view was to have three lists, namely, the Federal List, the Provincial List and the Concurrent List, each as exhaustive as we could make it, so exhaustive as to leave little or nothing for the residuary field. I believe that we have succeeded in that attempt and that all that is likely to go into the residuary field are perhaps some quite unknown spheres of activity that neither my Honourable Friend nor I can contemplate at this moment. We find that we have really exhausted the ordinary activities of government in the three other fields. I agree with my Honourable Friend that it means complications. I believe that it also means the possibility of increased litigation[1].'

[1] *Official Reports, House of Commons*, March, 27, 1935, Vol. 299, Columns 1928–29.

I shall give here the barest outline of the method followed in the India Act, 1935, in regard to the allocation of legislative powers between the federation and the constituent units. Elsewhere I have made a more detailed study of this problem[1]. It is necessary to point out that the Government of India Act, 1935, has adopted one method with regard to the partition of legislative powers as between the Federation and the British Indian Provinces and a different method in regard to this very matter in respect of the Federation *vis a vis* the Indian States. So far as the Federation and the British Indian Provinces are concerned, the Act has attempted to group together all possible heads of legislative power, including powers of taxation, under three separate lists. The first list, called the federal legislative list, contains subjects in respect of which the federal legislature is given the exclusive power to legislate; the second list, called the provincial legislative list, contains subjects which come within the exclusive sphere of the provincial legislatures. And to the extent to which either legislature encroaches upon the exclusive province of the other as demarcated in these lists, its legislation would become *ultra vires*. There is a third list, the concurrent legislative list, in which both legislatures operate, due provision being made in the act to resolve conflicts which would necessarily arise when two competing legislatures operate in the same area. With regard to any residue which may not have been foreseen and provided for in any of those lists, the act makes the novel provision that the Governor-General is to decide as to whether the federation or the provinces should be given control over it. It is obvious that the scheme now adopted will lead to the multiplication of the points of inconsistency in legislation. As overlapping on a wide scale is bound to occur when a grouping of all the

[1] M. Ramaswamy, *The Law of the Indian Constitution*, (London, 1938) at p. 217 ff.

possible heads of legislative power is attempted under three lists, it is only reasonable to expect that a large number of legal problems will present themselves for solution. With regard to those Indian States who want to enter the framework of federation, their accession would be required in respect of items 1 to 47 of the federal legislative list. The result is that in the case of the Indian States there would be only one list of federal subjects to deal with (though certain qualifications and reservations are to be permitted in the case of individual states in regard to their accession to the federal list of subjects for special reasons), while the whole of the residuary field would be at the disposal of the states. The impression left on one's mind by the present scheme of distribution of legislative powers under the India Act, 1935, is, that it is as complex as any it is possible to think of.

The idea of making the federal centre a government of enumerated powers with the residuary field vested in the constituent units has, as I have already observed, an obvious advantage in its favour. Such a method of distribution of legislative powers is much simpler than the one now followed in the Government of India Act, 1935. But it should not be supposed that legal problems as to the delimitation of national and state authority will never arise under the plan suggested. Far from that. Difficulties of legal interpretation are bound to occur even when there is only one federal list of subjects to deal with ; but to be sure, the difficulties are multiplied when instead of one list there are three. Both under the American and Australian constitutions, where the central governments are invested with specific powers, difficulty has been felt in delimiting their actual content in the context of concrete situations. In defining the powers which a government should have, a constitution necessarily employs words of a general character, and the determination of the actual scope of any such power is not always easy. Not only that. Difficulties also arise as to how far federal legislation has ousted

state authority in the same area in regard to the concurrent heads of power.

III

The Australian Plan of Allocation of Powers

As I favour the adoption of the Australian method of allocation of powers, subject to certain modifications, in the future federal constitution of India, it would be useful for us to have a rough idea of the Australian plan of distribution. The Commonwealth Parliament under the Australian Constitution Act possesses two kinds of powers, one exclusive and the other concurrent. Section 52 of the Commonwealth of Australia Constitution Act, 1900, provides that the Commonwealth Parliament is to have exclusive power to make laws with respect to (1) the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes; (2) matters relating to any department of the public service, the control of which is by the Constitution transferred to the Executive Government of the Commonwealth and (3) other matters declared by the Constitution to be within the exclusive power of the Commonwealth Parliament. The 'other matters' which are expressly stated to be within the exclusive power of the Commonwealth are contained in sections 90 and 111. Section 90 relates to the exclusive power of the Commonwealth to impose duties of customs and excise and to grant bounties on the production or export of goods; and section 111 deals with the exclusive jurisdiction of the Commonwealth over territory surrendered to it by any state. Section 51 of the Constitution Act is the principal section which makes the main grant of powers to the Commonwealth Parliament. It enumerates 39 separate heads of power, and some of these are by necessary implication exclusive, such as 'borrowing money on the public credit of the Commonwealth', 'fisheries in Australian waters beyond territorial limits' and 'the relations of the Commonwealth with the Islands of the

Pacific.' As Dr. Donald Kerr has pointed out in his treatise on *The Law of the Australian Constitution*, at page 10, the Constitution contains two other matters with respect to which the power of the Commonwealth Parliament by necessary implication is exclusive, 'namely by the combined effect of S. 51 (VI) and Section 114, Naval and Military Defence and Forces, and the combined effect of S. 51 (XII) and S. 115, Coinage.' With regard to the other heads of legislative power enumerated in Section 51, such as banking other than state banking, patents and trade marks, copyrights, bills of exchange and promissory notes, divorce and matrimonial causes, the federal power is concurrent with that of the states. The fact that these federal powers are only concurrent powers has to be inferred from two other provisions of the Constitution, namely those contained in sections 107 and 109. Seetion 107 provides: 'Every power of the Parliament of a Colony which has become or becomes a state, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the state, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the state, as the case may be.' Section 109 states: 'When a law of a state is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.' It is manifest from these provisions that in regard to any of the subjects which come within the concurrent field, the mere fact that the Commonwealth Parliament has been invested with power of legislation does not by itself affect either existing state legislation upon it or the power of the state to enact further legislation in regard to it. It is only when the Commonwealth Parliament has entered the field and covered it with actual legislation that state jurisdiction is ousted to the extent of the field occupied by federal legislation. Nice questions may arise as to how far federal legislation has superseded either existing state legislation upon any matter or

has rendered future state legislation in the field impossible because of prior federal occupation.

It will be noticed that Section 51 of the Commonwealth of Australia Constitution Act, 1900, which makes the main grant of power to the Commonwealth Parliament does not group the exclusive and concurrent heads of power into two parts. Exclusive and concurrent powers are all jumbled up in one place. As to what heads of power enumerated in Section 51 are exclusive powers, and what heads are concurrent powers, can only be decided with reference to the other scattered provisions of the Constitution Act. It seems to me that in arranging subjects of legislation under the federal list in the future constitution of India, it would be better to arrange them in two groups, one containing exclusive powers and the other concurrent powers. From the point of view of clarity, this arrangement ought, I think, to be welcomed. I shall revert to this subject later.

IV

Advantages of a Single List

I shall resume the main thread of the discussion. The point which I wished to make was merely that, while the adoption of a single federal list would not eliminate problems of interpretation in the matter of allocation of powers, it would, nevertheless, make for greater simplicity than what is possible under a plan of the kind now in operation under the Government of India Act, 1935. The second gain would be that the position of the Indian Provinces will be assimilated to that of the Indian States so far as the vesting of the residuary powers are concerned. But it must be pointed out that even under the new constitution the range of authority exercisable by the federation over the Indian States may not be as wide as that in relation to the Indian Provinces, as it may be found necessary to limit the federal jurisdiction over

the Indian States to some extent, having regard to the fact that their course of evolution so far has proceeded on lines somewhat different from that of the Indian Provinces.

V

The mistaken impression that the Vesting of Residuary Powers in the Units affects the Strength of the Federation

There is a widely prevalent impression that in a federal arrangement, a central government invested with specific powers would prove weaker than what it would be if it were given residuary powers. But I venture to submit that such an impression is really not correct, because, it is theoretically conceivable that, by a process of adjustment at the time of the framing of the Constitution, the residuary field of the constituent units may be made narrow or broad by carving out of the totality of powers originally vested in the federating units a large or a small estate in favour of the new central government. As Sir Robert Garran, sometime Solicitor-General for the Commonwealth of Australia, in the course of a lecture delivered by him on *The Development of the Australian Constitution* in London, on December 12, 1923, has observed: 'A residuary legatee is not necessarily better off than the donee of a specific bequest; it all depends on the amount of the bequest and the size of the estate. . The experience of Australia goes to show that specific subject matters, if widely enough expressed, and if not subject to excessive qualifications, can be relied on as the basis for a strong central government.' [1]

A central government which is invested with specific powers which are sufficiently wide and numerous is likely to prove more effective than the same government which is

[1] This lecture has been printed in 40, *Law Quarterly Review* (1924), see at p. 206.

given a residue, which is encroached upon by the state enumerated powers. Both United States and Australian experience supports this thesis.

VI

How the Impression came to be formed

How then did the impression to which I have alluded come to be formed? We have to delve a little into past history to find an explanation for this. The exploratory talks which led to the formation of the Canadian federation were held at a time when the neighbouring federal union of the United States was engaged in a fratricidal war. The lesson which the Canadian statesmen drew from the American episode was that the location of the residuum of power in the states instead of in the Union had strengthened the doctrine of state rights and that this fact was in large measure responsible for bringing on a civil war. They, therefore, were anxious to reverse the American plan of distribution of powers by which the states had reserved to themselves all sovereign rights except the portion which they had delegated to the central government, by a plan, which strengthened the central government by allotting to it all residuary powers remaining after giving to the provinces only such specific powers as were required for carrying on local activities. Mr. John A. Macdonald (later Sir John A. Macdonald, the first Prime-minister of the Dominion of Canada) alluded to this feature of the Canadian plan of allocation of powers when he made the following observations in the course of the Confederation debates, which were held in the Canadian Parliament on the Quebec resolutions: 'Ever since the Union was formed the difficulty of what is called 'State rights' has existed, and this had much to do in bringing on the present unhappy war in the United States. They commenced, in fact, at the wrong end. They declared by

their Constitution that each state was a sovereignty in itself, and that all the powers incident to a sovereignty belonged to each state, except those powers which, by the Constitution, were conferred upon the general government and Congress. Here we have adopted a different system. We have strengthened the general government. We have given the general legislature all the great subjects of legislation. We have conferred on them, not only specifically and in detail, all the powers which are incident to sovereignty, but we have expressly declared that all subjects of general interest not distinctly and exclusively conferred upon the local governments and local legislatures, shall be conferred upon the general government and legislature. We have thus avoided that great source of weakness which has been the cause of the disruption of the United States. We have avoided all conflict of jurisdiction and authority, and if this constitution is carried out, as it will be in full detail in the imperial act to be passed if the colonies adopt the scheme, we will have, in fact, as I said before, all the advantages of a legislative union under one administration, with, at the same time, the guarantees for local institutions and for local laws, which are insisted upon by so many in the provinces now, I hope, to be united.' [1]

I do not think that the fathers of the Canadian Constitution were right in thinking that the American Civil War was the direct consequence of vesting residuary powers in the constituent units and thus giving undue emphasis to state rights. They were, however, certainly right in thinking that national salvation depended upon keeping centrifugal tendencies under control and this they sought to achieve by strengthening the hands of the central government by various devices. One of these related to the plan adopted for the distribution of legislative powers. The particular method

[1] Cited by Kennedy : *Essays in Constitutional Law*, pp. 88-89.

which they followed to secure the supremacy of the central government in the matter of allocation of powers namely the grant of the general residuary power supplemented by a few specific powers, as I shall presently show, has not proved very successful. Judicial interpretation by the Privy Council of the scope of the residuary power granted to the Dominion government under Section 91 of the British North America Act, 1867, has largely frustrated the intentions of the fathers of the Canadian Constitution. And the decisions of the Privy Council, particularly in *Toronto Electric Commissioners* v *Snider*,[1] *Attorney-General for Canada* v *Attorney-General for Ontario*,[2] and *Attorney-General for Canada* v *Attorney-General for Ontario*,[3] as Dean Vincent C. Macdonald of the Dalhousie Law School has pointed out, mark 'the declension of the residuary power of the Dominion from its intended function as the standard-bearer of a centralized federalism to the status of a safety-valve in time of acute national emergency.'[4] I shall address myself to this aspect a little later.

The point which I wanted to make at this stage, however, was that the fathers of the Canadian Constitution were a little wide of the mark in laying the blame for the american civil war at the door of the american doctrine of state rights which gave primacy to the sovereignty of the states upon the plea that under the american constitution the federal government had been invested with specific powers only by the states. The civil war was one of the most tragic episodes in american history. South Carolina's secession from the Union was followed by the secession of ten other states, the seceding states organizing a confederacy in opposition to the Union. The movement for secession proceeded not so much from any

[1] (1925) A. C. 396.
[2] (1937) A. C. 326.
[3] (1937) A. C. 355.
[4] *Canadian Bar Review:* Special Constitutional Number, (1937) Vol. XV, p. 419.

worship of state sovereignty pure and simple as from other causes, chiefly economic. The sentiment in favour of secession took a long time to mature. After the admission of Alabama into the Union in 1819, there were an equal number of slave-holding and free states within the federal framework, eleven of each kind. When Missouri sought admission, the question arose whether it should be admitted as a free or a slave state. Fortunately the crisis was tided over by admitting Missouri as a slave state and Maine, which had been carved out of Massachusetts, as a free state simultaneously. The Missouri compromise was the beginning of the cleavage between the North and the South. Then came the quarrel over the tariff. The prosperity of the southern states was largely founded upon the three great agricultural staples of cotton, wheat and tobacco, the markets for which were outside America. The Southern States were steadily losing ground in the economic sphere. The causes for this were many and complex. The wasteful agricultural methods pursued, soil erosion, depletion of population by the movement towards the rich lands of the lower Mississippi basin, and the newly developed competition of the south-west including Tennessee in agricultural commodities especially cotton, had made the outlook for the Southern States very bleak indeed. The protective tariff which came as a result of the pressure of the industrially advanced north was deeply resented by the south which had to get manufactured goods from abroad upon which customs had been levied or from the northern states whose prices were maintained under the artificial conditions created by the tariff. The movement in favour of secession took root in this fertile soil of economic maladjustments. And the southerners found a first rate intellect in John C. Calhoun who developed his theory of nullification with great astuteness. But it is important to observe that the doctrine of state sovereignty was not developed for its own sake but as a convenient instrument, to defend the sectional interest of the

southern states, which had been grievously affected by the tariff and other causes. As Andrew C. McLaughlin has observed: 'Anyone studying the fact and the influence of sectionalism in American history will hesitate to emphasize the feeling or the peculiar interests of any one section as compared with others; but he cannot forget the southern sense of a common southern cause which came in the course of time to produce secession. This sentiment grew after slavery had furnished plainly a common ground for the south to stand upon, and this growth took place more conspicuously after 1853 than at any earlier day. And still, as we see a degree of uniformity in opposition to the tariff, after about 1824, and see also the pronouncement that southern interests were the victims of northern aggression, we get an impression of a coming trouble based on a feeling of a real, though perhaps still vague, sectional solidarity. The doctrine of States' rights and State sovereignty have already been mentioned in this work. . . .; but as a matter of fact the doctrine was a weapon of defense, not so much for protecting the peculiar interests of a particular state, as for defending a section and a sectional economic interest. Therein lay the danger to the Union—sectional diversity and sectional sentiment, aided, if need be, by constitutional argument which was based upon the individuality of the States.' [1]

VII

The Dominion Residuary Power under the Canadian Constitution

We shall be in a proper position to appreciate the rôle now assigned to the Dominion residuary power by Judicial decisions if we have a clearcut idea of the Canadian plan of distribution of legislative powers. The sections of the British

[1] A. C. McLaughlin: *A Constitutional History of The United States*, p. 430 (1936).

North America Act, 1867 which are relevant for this purpose are sections 91, 92 and 95. Section 95 makes agriculture and immigration subject to the concurrent control of both the provincial and dominion legislatures, with the qualification that, where any law passed by a provincial legislature with respect to those subjects comes into conflict with a dominion law, the latter is to prevail. Sections 91 and 92 are the main provisions which make the allocation of powers between the Dominion and the Provinces. In outline these sections are as follows:

Section 91. It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the legislatures of the Provinces; and for greater certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada, extends to all Matters coming within the Classes of Subjects next herein-after enumerated, that is to say—[Here follows a list of twenty-nine classes of subjects].

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Classes of Matters of a local or private nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the legislatures of the Provinces.

Section 92. In each Province the Legislature may exclusively make laws in relation to matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—[Here follows an enumeration of sixteen classes of subjects, the last of which, item 16, runs thus—Generally all Matters of a merely local or private nature in the Province].

I shall not undertake any detailed study of these sections. But on a bare examination of these, uninfluenced by any judicial dicta, the following conclusions, in my submission, emerge: (1) The limit of provincial jurisdiction is confined to the 16 enumerated classes of subjects set out in Section 92. These Classes of Subjects are described by the concluding clause of Section 91 as matters of a 'local or private nature.' (2) Although the net effect of both sections is to vest in the Dominion a general power to make laws for the Peace, Order and Good Government of Canada, over all matters as do not come within the 16 classes of subjects coming within the exclusive domain of the provinces, Section 91 does not restrict itself to the bare statement that all legislative powers not vested by Section 92 in the Provinces are to belong to the Dominion. (3) Section 91, in fact, enumerates 29 classes of subjects as those which come within the exclusive competence of the Dominion Parliament, and then buttresses them up with a general residuary grant.

Mr. John A. Macdonald, who started with a decided preference for a unitary constitution for Canada, realising the impossibility of establishing such a constitution in view of the geographical, racial and economic differences which existed, later threw all his energies into the creation of a Canadian federation with a strong unitary bias. In this task he largely succeeded. The unitary twist of the final constitutional framework is discernible not only in the manner in which the allocation of powers was made but also in two other notable features of it namely the vesting of the authority to appoint Lieutenant-Governors of the Provinces in the Governor-General-in-Council and in the power given to the same authority to disallow provincial legislative acts within a year after they were enacted into law. But as subsequent events have shown, the intention of the framers of the constitution has to a large extent failed to fructify.

The Privy Council in *Hodge* v *The Queen*[1] and in *The Liquidators of the Maritime Bank of Canada* v *The Receiver-General of New Brunswick*[2] vigorously resisted the attempts made to reduce the provincial legislatures under the British North America Act to the level of municipal institutions and held that those legislatures within the ambit of their powers had plenary authority as wide as the imperial and dominion parliaments had within their respective competence. So far there was nothing to quarrel about. To have taken a different view would have meant the death-knell of the federal idea which postulates the co-existence of two sovereignties working each in its own orbit.

From the way in which the plan of distribution of powers was constructed, the framers of the constitution were convinced that the Dominion Government in the future would have adequate power to deal with all matters of common concern to the various units. Lord Carnarvon, the then Secretary of State for the Colonies, explaining the purpose of the British North America Bill at its second reading in the House of Lords observed: 'The real object which we have in view is to give to the Central Government those high functions and almost sovereign powers by which general principles and uniformity of legislation may be secured in those questions that are of common import to all the provinces; and, at the same time, to retain for each Province so ample a measure of municipal liberty and self-government as will allow, and indeed compel, them to exercise those local powers which they can exercise with great advantage to the community .... In closing my observations upon the distribution of powers I ought to point out that, just as the authority of the Central Parliament will prevail whenever it may come into conflict with the local legislatures, so the residue of legislation, if any, unprovided for in the specific classification which I have

[1] (1883) 9 App. Cas. 117. [2] (1892) A. C. 437.

explained will belong to the Central body. It will be seen under the 91st clause that the classification is not intended 'to restrict the generality' of the powers previously given to the Central Parliament, and that those powers extend to all laws made 'for the peace, order and good government' of the Confederation—terms, which, according to all precedents, will, I understand, carry with them an ample measure of legislative authority[1].'

It is easy enough to summon an impressive array of contemporaneous evidence in support of the thesis that the Canadian Constitution-builders definitely sought in the manner of allocation of powers to strengthen the hands of the Dominion. I have already quoted from the speeches of Macdonald and Lord Carnarvon. One more pronouncement to the same effect will, I think, do. Tupper, referring to the Quebec resolutions, stated: 'Those who were at Charlottetown will remember that it was finally specified there that all the powers not given to local, should be reserved to the federal, Government. This was stated as being a prominent feature of the Canadian scheme, and it was said then that it was desirable to have a plan contrary to that adopted by the United States. It was a fundamental principle laid down by Canada and the basis of our negotiations[2].'

Decisions of the Privy Council during recent years have made it clear that the general residuary power of the Dominion Parliament can only be invoked in an emergency when there is a grave threat to the national life of Canada, and not to deal with problems of national or general importance. In 1882 Sir Montague Smith delivering the judgment of the Privy Council in *Russell* v. *The Queen*[3] had upheld the

[1] Cited in the Report made to the Canadian Senate by the Parliamentary Counsel Mr. W. F. O'Connor on the British North America Act, p. 59 (1939).

[2] Cited in the Report made to the Canadian Senate by the Parliamentary Counsel Mr. W. F. O'Connor on the British North America Act, p. 57 (1939).

[3] (1882) 7 A.C. 829.

validity of a Dominion Temperance Act prohibiting under certain limitations, liquor traffic throughout Canada. In *Attorney-General for Ontario* v. *Attorney-General for The Dominion*,[1] known as *The Local Prohibition Case*, Lord Watson delivering the judgment of the Privy Council had stated: 'Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada.'

The language used by Lord Watson in this case seemed to imply that matters ordinarily local in importance might by the operation of time and other factors become matters of national and general importance so that, in their new and national aspect, they may become competent matters of dominion legislation under the dominion residuary power. But later cases have dissented from this view and have restricted the application of the residuary clause to grave national emergencies only. War, for instance, would afford an excuse for over-riding 'property and civil rights' which ordinarily come within provincial legislative competence, *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.*[2]

In *Toronto Electric Commissioners* v. *Snider*[3] a rather useful piece of dominion legislation which provided machinery for the settlement of industrial disputes in certain large industries and which had worked satisfactorily for a long time was declared ultra vires by the Privy Council on the ground

[1] (1896) A.C. 348, at p. 361. [2] (1923) A.C. 695. [3] (1925) A.C. 396.

that it trenched upon 'property and civil rights', a topic within provincial competence under head 13 of Section 92 of the British North America Act, 1867. The provisions of the Act, it was ruled, directly concerned the civil rights of employers and employed in a province. Viscount Haldane who spoke for the Privy Council on the occasion further ruled that 'it is not now open to him to treat *Russell* v. *The Queen* as having established the general principle that the mere fact that Dominion legislation is for the general advantage of Canada, or is such that it will meet a mere want which is felt throughout the Dominion, renders it competent if it cannot be brought within the heads enumerated specifically in Section 91.'

This decision made it impossible for the dominion to deal with industrial disputes on a nation-wide basis, although such disputes, in view of the complex and closely integrated character of the industrial texture, might have demanded, for their efficient handling and settlement, the setting up of a central machinery by the dominion.

In *Attorney-General for Canada* v. *Attorney-General for Ontario*[1] otherwise known as *The Labour Conventions Case*, the attempt to invoke the federal residuary power in aid of a problem which was undoubtedly of national importance and of general concern met with a cold douche at the hands of the Privy Council. In this case the validity of certain statutes passed by the Dominion Parliament to give legislative effect to certain conventions adopted by the International Labour Organization of the League of Nations in accordance with the Labour part of the Treaty of Versailles had been challenged on the ground that they affected property and civil rights in the province, which came under provincial legislative competence. The attempt of the Dominion to rest its case on Section 132 of the British North America Act failed of acceptance by the Privy Council on the ground that the

[1] (1937) A.C. 326.

section contemplated an Empire treaty to which Canada and other members of the British Empire were parties and not a treaty entered into by Canada by herself in virtue of her new status as an international person. The Dominion also invoked its general residuary power to support this legislation but even this attempt failed on the ground that the circumstances calling for its invocation namely exceptional conditions threatening the national life of Canada did not exist in this case. In *Attorney-General for Canada* v. *Attorney-General for Ontario*[1] known as the *Employment and Social Insurance Case* also the same view was expressed by Lord Atkin speaking for the Privy Council.

It is fairly obvious from the views expressed by the Privy Council in recent cases that the intention of the framers of the Canadian Constitution in giving a general residuary power to the Dominion Parliament namely that it should have power to deal with national problems on a national scale has been frustrated. As Professor W. P. M. Kennedy has observed: 'The federal 'general power' is gone with the winds. It can be relied on at the best when the nation is intoxicated with alcohol, at worst when the nation is intoxicated with war; but in times of sober poverty, sober financial chaos, sober unemployment, sober exploitation, it cannot be used, for these, though in fact national in the totality of their incidents, must not be allowed to leave their legal water-tight provincial compartments; the social lines must not obliterate the legal lines of jurisdiction—at least this is the law, and it killeth.'[2]

The net effect of the decisions of the Privy Council on this matter is to make Dominion legislative authority, for all practical purposes, to be restricted to the 29 enumerated heads of power in Section 91 and to render the general residuary

[1] (1937) A.C. 355.
[2] *Canadian Bar Review:* Special Constitutional Number, (1937), Vol. XV, pp. 398–399.

power of no value in ordinary times. Some competent observers seem to think that judicial interpretation by the Privy Council of the Canadian scheme of allocation of powers has practically resulted in the transfer of the residuary powers to the provinces. The 'property and civil rights' head of power (head 13 of Section 92) has, it is argued, practically swallowed up the dominion residuary power. The present position could not have been foreseen by the fathers of the Canadian Constitution. But it is possible to take another view of this matter. If a wider interpretation had been given to the dominion residuary power, the result might well have been to reduce the provinces to the level of glorified municipalities, as many subject-matters normally vested in the provinces might have been drawn into the dominion orbit.

VIII

Canadian Experience Summed Up

I have dwelt at some length on the Canadian plan of allocation of powers only with a view to show that Canadian experience does not bear out the proposition that a central government invested with residuary powers will necessarily prove stronger than a central government which is given a bundle of specific powers. But I wish to guard myself against the creation of an impression in the mind of the reader that Canadian federalism has been a failure. That would not be true to facts. Canada has indeed prospered under the federal dispensation. A sense of national unity has been created. On the economic plane Canada's progress has been great, and even spectacular. The constitutional instrument certainly requires adjustments to cope with present day problems. If we remember that that instrument was fashioned seventy-five years back when conditions were so very different from what they are now, the wonder is not that it has disclosed defects but that it has been able to subserve the interests of the country as well as it has done.

IX

The Central Governments under the United States and Australian Constitutions

As I have indicated already, both Australia and the United States have worked under a different scheme of allocation of powers. The central governments in both these countries have been invested with specific powers only. Both these federations have, I think, done well even under this plan. The central governments of Australia and America have been able to develop a large measure of unity of action in regard to many phases of national activity not only during war time but also in ordinary times.

X

The Position of the Commonwealth Government under the Australian Constitution

When the Australian Constitution was in the process of being formulated, its framers had before them both the United States and the Canadian patterns of allocation of powers but they deliberately chose the United States pattern. They thought that the difficulties which had been experienced in the working of the Constitution of the United States was due not so much to the way in which the problem of residuary powers had been dealt with under it as to the fact that certain very necessary powers which ought to have been given to the federal government had been withheld from it. They, therefore, took special care to repair this weakness. As Mr. H. S. Nicholas, who appeared as counsel for the Commonwealth Government before the Royal Commission on the Australian Constitution, pointed out in his opening address before the Commission: 'They did maintain the dignity of the states, but they held that difficulties which had arisen in America were due not so much to the manner of dealing with residuary powers as to the nature and number of the powers

that were signed. That was stated very particularly in the report furnished by the federal draftsmen to the South African Governments when their Constitution was under consideration. The South African Governments sent for a report on the working of the Australian system before their union and the draftsmen in that report gave reasons for the choice of the American model, and they drew the distinction that I have just drawn between the American and Canadian systems.' [1]

The Royal Commission which reported on the working of the Australian Constitution have adverted to the powers enumerated in the Commonwealth Constitution which are not to be found in the United States Constitution in these terms: 'The matters which are specifically assigned to the Commonwealth Parliament but which are not assigned to Congress, or are only assigned to it in part and as incident to a specified subject matter (e.g., the regulation of foreign and interstate trade), include bounties on the production or export of goods, insurance, bills of exchange and promissory notes, marriage, divorce and matrimonial causes, invalid and old-age pensions, the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the Courts of the States, the people of any race, other than the aboriginal race in any state, for whom it is deemed necessary to make special laws, the acquisition of railways from a state, railway construction and extension in a state, and conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state.'[2]

While it is true that special attention was bestowed in drawing up the list of powers to be given to the Commonwealth Parliament, to give that Parliament all powers requisite for it to deal with problems of national importance, care was taken also to see that the states were left with sufficient

[1] *Royal Commission on the Constitution of the Commonwealth*: Report of Proceedings and Minutes of Evidence, page 7.

[2] *Report of the Royal Commission on the Australian Constitution*, (1929), p. 76.

powers to deal with local problems. As a matter of fact the feeling in favour of state autonomy was very strong when the Australian Constitution was set up and the Constitution itself reflects in many of its provisions the general background of state rights. The Governor of a State in Australia is appointed directly by the Crown and not by the Governor-General as in the case of a Lieutenant-Governor of a Canadian Province. The process of amendment of the Constitution is specially made difficult. And Section 106 of the Act which provides that 'the Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State' shows the anxiety of the framers of the Constitution to respect the autonomy of the States.

It is possible to pile up a great mass of evidence in support of the thesis that the Federal government under the Australian Constitution has been able to function as a strong central authority not only during wartime but also in peacetime. Judicial interpretation of the main clauses of the Australian Constitution by the High Court of Australia has, on the whole, helped to strengthen the hands of the federal government in important matters. During the last war, under the defence power of the Commonwealth, large segments of civil and economic life were controlled by Commonwealth statutes and regulations. Prices of various commodities were fixed, wheat and wool crops were compulsorily acquired, and diverse regulations affecting ordinary civil life were made under the defence power. The ordinary lines of jurisdiction separating federal and state power were obliterated under the stress of war conditions. The process of obliteration of the normal lines of federal and state jurisdiction has taken place on an even more extensive scale during the present wartime emergency, by the Commonwealth Government initiating

a wide range of governmental controls to cope with the abnormal situation. The High Court of Australia in the important case of *Farey* v. *Burvett*[1] which related to the validity of a Commonwealth regulation fixing the price of bread in the suburbs of Melbourne, upheld it on the ground that during wartime the Commonwealth could take all measures as would help in the successful prosecution of the war. In *Amalgamated Society of Engineers* v. *Adelaide S. S. Co., Ltd.*,[2] known as The *Engineers' case*, the High Court of Australia abandoned the doctrine of 'implied prohibition' which it had consistently supported from the early days of federation. The effect of this decision is that Commonwealth powers are now able to play a wider rôle in national life than was possible for them under the earlier rule of interpretation. It was held in that case that state agencies and instrumentalities were subject to federal legislation enacted by the Commonwealth Parliament with respect to industrial disputes, a matter on which it was competent to legislate under Section 51 (XXXV) of the Australian Constitution Act, and that no immunity on the basis of their being state agencies and instrumentalities could be claimed. The taxation and financial provisions of the Constitution have, on the whole, worked in favour of the Commonwealth Government and to the detriment of the States. It is possible to multiply similar instances to show that the federal government has been able to exercise a powerful influence on the national life of Australia. But I shall not have space for this. Experience has also shown that the powers of the Commonwealth Parliament in certain directions is inadequate. Navigation and Aviation may be cited as two notable instances of

[1] (1916) 21 C.L.R. 433; See also the recent case of *South Australia* v. *Commonwealth* (1942) 65 C.L.R. 373 where the validity of the Income Tax Act, 1942, and the States Grants (Income Tax Reimbursement) Act, 1942, was upheld. The High Court of Australia by a majority consisting of Rich, Mctiernan and Williams JJ. (Latham C. J., and Starke J., dissenting) gave a very wide interpretation to the Commonwealth Defence Power in this case.

[2] (1920) 28 C.L.R. 129.

this kind. Under the present scheme, navigation and shipping only of an overseas or interstate character come under federal control, intrastate navigation and shipping being within the scope of state power. This has led to serious administrative and other inconveniences. The only effective solution for this unhappy state of affairs lies in the transfer of full control over these subjects to the Commonwealth Government. The case for the Commonwealth Government being invested with power over aviation is also strong. At present the Commonwealth Parliament can legislate in regard to military aviation under the defence power. With regard to civil aviation, the jurisdiction is divided between the Commonwealth and the States. The Commonwealth can only act in aid of foreign and interstate commerce under its trade and commerce power and in relation to postal and telegraphic services under the postal and telegraphic power. Intrastate civil flying continues to be a state function.

XI

The Position of the Federal Government under the United States Constitution

The experience of the United States in working a central machinery equipped with specific powers has also been distinctly encouraging. A study of the manner in which the centripetal forces generated by the congressional powers over war, the control over foreign and interstate commerce, and the making of treaties, have been able to vitalize and nourish national life in the United States is bound to prove of absorbing interest. Obviously no detailed study of this theme is possible here. But it seems worth-while to indicate in a general way the vital rôles which these three great powers have played in reducing to order the diverse and sometimes mutually antagonistic forces operating in the country and diverting them into the fruitful channels of co-ordinated national endeavour. Under its war power, Congress is vested in time

of war with practically absolute control, over the manpower and economic resources of the land. It may, for instance, conscript men into military service, *Selective Draft Law Cases*;[1] and invest the President with authority to take over and operate the railways of the country, *Northern Pacific Ry. v North Dakota.*[2]

The commerce clause (Article I, Section 8, Clause 3) which vests the power of regulation of foreign and interstate commerce in Congress has proved to be one of the most dynamic and beneficent provisions in the United States Constitution. As Professor Edwin R. A. Seligman has observed: 'Federal control over interstate commerce is the basis and secret of our economic prosperity. What we did was in effect to create a national market for all local productions—a market untramelled by any restrictions or limitations. That is precisely what they are trying to do in Europe to-day. It is the one great thing that has made this country what it is[3].' The commerce clause has acted in two important ways on the economic life of the land. In the first place it has functioned, of its own accord, as a restraining force upon the powers of the states, whether taxing or regulatory, which in any wise obstructed or burdened the free flow of foreign and interstate commerce. As commerce can flow across state lines unhindered, industries can be established at points most convenient for their location, judged by their proximity to raw materials, the availability of power and labour resources near at hand, and other kindred factors. A national market is thus created for local productions as internal barriers to the free movement of goods are frowned upon by the commerce clause. In the second place, this clause has been a source of motive power for the federal government to take positive action designed to help foreign and interstate commerce. Congres-

[1] (1918) 245 U. S. 366.
[2] (1919) 250 U. S. 135.
[3] *Annals of the American Academy of Political Science:* Federal versus State Jurisdiction in American Life: Vol. CXXIX, January 1927, pp. 2–3.

sional enactments under the commerce power have been of the most diverse character. Anti-trust legislation, legislation to control rail, water, motor and air-borne interstate and foreign commerce, statutes to deal with the activities of telegraph telephone and radio-broadcasting companies operating in foreign and interstate commerce, may be given as instances of the varied nature of federal legislation based upon the commerce power.

Wise and farseeing men as the United States Constitution builders were, they realised that it would not be sufficient if the federal government—the President of the United States acting in conjunction with at least two-thirds of the members of the Senate present—were merely given the power to enter into treaties with other countries but that the Constitution should specifically provide that all such 'treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.' Under the treaty-making power, the federal executive and legislature can give legal effect to international treaties and agreements entered into by the United States although the treaty might contain stipulations which trench upon the normal sphere of the states. The federal government in the United States is thus supreme in the domain of treaty-relations. Under the Government of India Act 1935, as we shall see later, the Indian federal government is at the mercy of the constituent units, in regard to the implementation of the stipulations of a treaty negotiated by it when such stipulations come within the sphere of such units.

XII

How Legislative Powers should be Distributed in the Future Constitution of India

Limitations of space prevent me from embarking upon a study, more detailed than that which I have attempted, of how

the federal governments of the United States and Australia have functioned under a plan of allocation of powers which has vested in those authorities power over specific subjects only. But sufficient instances have been given to show that the federal governments in both these countries have not done badly at all in those spheres of activity where unity of action is demanded by considerations of the common welfare of all the federating units. As I have submitted already, it would be well for us, following American and Australian examples, to entrust the Indian Federal Government of the future with specific powers only. The Indian National Congress has also favoured this method of allocation of powers. In its resolution dated 8th August, 1942, it says that the Future Constitution of India 'should be a federal one, with the largest measure of autonomy for the federating units, and with the residuary powers vesting in these units.' This resolution may be regarded as a friendly gesture to the great Muslim community which has always attached a great deal of importance to the constituent units being allowed a wide measure of local autonomy in the future constitutional arrangements.

CHAPTER II

DISTRIBUTION OF POWERS BETWEEN THE CENTRE AND THE UNITS

I

Introductory

In allocating legislative powers between the federation and the constituent units, the main consideration to be kept in view is neither to sacrifice reasonable central unity nor reasonable state autonomy. If the federal centre is not equipped with adequate powers to deal with problems and situations demanding unity of action, then we are building a structure on a foundation of sand liable to collapse at the first onset of storm. To withhold necessary powers from the federation is to play with the happiness and security of millions of human beings. On the other hand, if power is highly centralized in the federation, the structure will tumble down of its own top-heaviness. The units must be left with adequate powers to deal with the manifold problems which arise in their contacts with the daily life of their citizens.

I believe that the arrangement which I am suggesting satisfies the twin tests of reasonable national unity and reasonable local autonomy. I am conscious of the difficulties which are inherent in this problem and have striven to find a workable solution for it.

In drawing up a list of subjects over which the Indian Federal Legislature should have powers of legislation, I start with the federal list of subjects contained in list I of the seventh schedule of the Government of India Act, 1935, as well as the concurrent list embodied in list III of the same schedule of that statute. I am making alterations, additions

and subtractions in these two lists in order to arrive at the final list of federal subjects. Wherever comments seemed to me to be necessary to explain the scope of these subjects, I have furnished them. I have made use of the experience of the three great English-speaking federations of the United States, Canada and Australia, in drawing up this list. Perhaps the richest storehouse of experience of the working of a federal system is that available in regard to the United States. During more than a century and a half of its existence as a federal union, many problems of great importance and complexity have arisen in the field of federal and state relations. The experience of Australia and Canada under a federal dispensation also offers valuable lessons. A Royal Commission reported on the working of the Australian Federation in 1929. The report of this Commission is full of valuable material. More recently, a Royal Commission went thoroughly into the whole question of Dominion-Provincial relations in Canada ever since the federation was inaugurated and made suggestions regarding the constitutional changes which it considered necessary to fit the British North America Act, 1867, to meet the demands of changed economic and political conditions which have come into being since federation. The report itself was issued so recently as 1940. I have made use of the Reports of these Commissions in the task which I have set out to perform. I am fully conscious of the fact that, while the experience of other federations is bound to be of the utmost value to us, we cannot afford slavishly to copy the constitutional arrangements made in other federations, without modifications demanded by our own conditions and needs. At the same time, I hold the view that there are certain problems which are basic to most federations, and solutions found for them in other federations would prove useful for us also. And it would indeed be unwise of us not to profit from the wealth of experience available in the working of other successful federations.

II

Certain Basic Problems connected with the Establishment of a Federation in India

Though my main task is to frame a list of federal subjects, I have considered it necessary to draw attention to four or five problems of first rate importance, problems for which proper solutions will have to be found if the future Indian Federation is to have any reasonable chance of success.

Almost the first problem which occurs to my mind is that of the efficient defence of the country. The Federation should have adequate and supreme powers not only to organize and conduct the defence of the land during wartime but also to take all measures in peacetime as will promote the military preparedness of the nation. The Federation should also have full power not only to negotiate and conclude treaties, agreements and conventions with other countries, but also to be able to implement their provisions in the legislative field by the enactment of appropriate legislation on its own authority, even though such legislation might trench upon the normal sphere of the federating units. I do not wish to say more on these problems at this stage as I shall deal with them when I consider the appropriate legislative heads of power in my proposed list of federal subjects.

Few will dispute the great importance of ensuring that in the Indian Federation of the future there should be no internal barriers to the free flow of commerce across the frontiers of the federating units. In fact in every fully developed federation the absence of restrictions on the free movement of commerce across State lines is regarded as of great importance. In the United States of America, the Commerce Clause contained in Article I, Section 8, Clause 3 of the Constitution, which invests the federal government with the power to regulate foreign and interstate commerce, has been mainly responsible for the breaking down of barriers to the free flow of interstate

commerce. And the economic prosperity of the United States is to a large extent due to the fact that that country is able to function as a single economic unit uninfluenced by the existence of State frontiers. The position of Australia in this respect is very similar to that of the United States. As Lord Wright in delivering the judgment of the Privy Council in *James* v *Commonwealth of Australia*[1] has observed: 'The idea starts with the admitted fact that Federation in Australia was intended (*inter alia*) to abolish the frontiers between different States and create one Australia. That conception involved freedom from customs duties, imposts, border prohibitions and restrictions of every kind: the people of Australia were to be free to trade with each other, and to pass to and fro among the States, without any burden, hindrance or restriction based merely on the fact that they were not members of the same State.'

India, like the United States, enjoys an impressive array of diversified climates and resources. Like the United States, India possesses an internal market of huge dimensions. If her agricultural, mineral and other resources are to be employed to the best advantage, the need for India to function as a single economic unit surrounded by a single uniform tariff wall and with complete freedom of internal commerce, is obvious. And it should be one of the first tasks of the constitution-builders to see that India functions as a single economic entity. Now, so far as the British Indian Provinces are concerned, this freedom of internal commerce is secured by the provision contained in Section 297 of the Government of India Act, 1935. In the case of the Indian States, however, it was proposed that they should continue to enjoy the liberty of levying internal customs duties even after they had become members of the federation, although the Joint Select Committee strongly favoured the gradual abolition by the States of

[1] (1936) A.C. 578 at p. 630

such duties and their substitution by other levies.[1] This vital problem, it seems to me, cannot be left in a state of uncertainty. It must, no doubt, be recognized that such of the Indian States as have relied upon this source of revenue to balance their budgets, cannot be expected to abolish these levies all at once. That would cause undue hardship to them. But such States must bind themselves to completely abolish these duties within a definite period of say 8 or 10 years before they are allowed to join the framework of federation. After the lapse of this period, the States equally with the Indian Provinces should be subject to a provision incorporated in the Constitution against restrictions on the freedom of internal trade.

Closely bound up with the problem of ensuring the freedom of internal commerce throughout the federation is the allied problem of also ensuring that the federation is invested with full control over the regulation of the foreign commerce of the country. It is obvious that numerous difficulties are bound to arise unless the Central Government is competent to exercise proper authority over tariffs, administration of major ports, trade agreements with foreign countries and other allied matters. At this point we are brought face to face with the rather difficult problem of the maritime Indian States in regard to the levy of sea-customs. The Government of India have entered into arrangements with many of these maritime States providing that all goods imported at the States' ports are to be subjected to customs duty at full British Indian rates. As the Hon'ble Sir James Grigg, the then Finance Member, pointed out in reply to a question by Sir H. P. Mody in the Indian Legislative Assembly, on 6th October, 1936: 'The Government of India have for some time been in negotiation with certain maritime States of

[1] *Report of the Joint Committee on Indian Constitutional Reform*, Vol. I, p. 169.

Kathiawar with a view to arriving at a settlement to regulate the import of foreign goods at the States' ports, including particularly goods destined for markets beyond Kathiawar. The main object has been, with due regard for the rights and interests of the States, to prevent the development of uneconomic practices which lead to the diversion of trade from its natural channels. Agreements have now been concluded with the States of Junagadh, Nawanagar, Porbandar and Morvi, whereby arrangements have been made with a view to ensuring that all goods imported at the States' ports are effectively subjected to customs duty at full British Indian tariff rates . . . An agreement has also been concluded with another maritime State, namely Baroda, whereby the State will retain the revenue from customs duties levied on foreign goods imported at its ports, subject to a maximum equal to the estimated revenue derived from the consumption of such goods in the territories of the State.'[1]

The insistence on the maritime States adopting the schedule of tariffs operative in British India with regard to goods imported through their ports is undoubtedly a step in the right direction. The Joint Select Committee on Indian Constitutional Reform recommended that the maritime States 'should be allowed to retain only so much of the customs which they collect as is properly attributable to dutiable goods consumed in their own State'. They probably thought that these States would regard the total surrender of this revenue too high a price to pay for their entry into federation. It must be remembered that customs duties collected at British Indian ports feed the central exchequer. If we have regard to this fact, no distinction seems permissible as between a maritime State and a maritime British Indian Province. In an article contributed by me to the *University of Toronto Law*

[1] *Official Report: Indian Legislative Assembly Debates*, 6th October, 1936, Vol. VIII at pp. 2410-2411.

Journal in 1940 on 'The Indian States in the Indian Federation', I referred to this question in these words: 'There is a great deal to be said in favour of this view of the Joint Select Committee only if we regard it as a temporary solution of a phase which will pass away. To ask these States immediately to surrender this source of revenue would be hard upon them as they have relied upon this source of revenue to balance their budgets. But this arrangement should not endure beyond a reasonable period after the entry of these States into the federation. To perpetuate this discriminatory treatment for all time or for a long time would be to infringe the doctrine of equality in the financial burden to be borne by the constituent units, which is everywhere regarded as an essential feature of a federal union.' [1]

I would make the following suggestions with regard to the control to be exercised over the Indian State ports in the federal arrangements of the future. These ports should be brought under the control of the federation with respect to tariff regulations, civil and criminal jurisdiction and administration. The States will have to be compensated for the moneys which they have expended for the development of their ports. An annual subvention may be granted from the central revenues to each of these maritime States for a definite period, say 10 or 15 years, the subvention payable being assessed at the average annual customs revenue attributable to the dutiable goods consumed in its territory calculated over a period of 10 years prior to its entry into the federation. This is only a temporary arrangement devised with a view to prevent the dislocation of the budgetary arrangements of the maritime States by the sudden withdrawal of their customs revenues. Port trusts will have to be created for the State ports giving the States concerned an important share in their management. The States may feel that once the State

[1] *The University of Toronto Law Journal*, Vol. III at p. 312 (1940).

ports come under federal jurisdiction, their interests may be neglected in favour of the more powerful British Indian ports. But it is possible to devise proper safeguards for ensuring that the federal government does not sacrifice the interests of the State ports and that it will strive to maintain them at a high standard of efficiency so that they may continue to serve the sea-borne trade of their hinterlands as heretofore.

Some of the Indian States have their own coinage; most of these, however, minting coins of smaller denominations only. Hyderabad not only mints coins but issues paper currency. It should be remembered that in every federation the regulation of coinage and currency is entrusted to the sole control of the Central Government. The Indian States who are now issuing coinage and currency must surrender these powers in favour of the federation.

Nor can those Indian States who maintain their own postal systems be allowed to come into the federation without surrendering their powers over them to the Central Government; for, it is an essential feature of a federation to have a unified postal system.

III

A Single Federal List arranged into two Groups

Having discussed some fundamental problems connected with the establishment of a federal constitution in India, I shall now proceed to draw up a list of federal subjects over which the Indian Federal Legislature, subject to the Constitution, should have powers of legislation. There is one preliminary matter of great importance to which it is necessary to draw pointed attention. As I have already observed, while discussing in the first chapter the Australian scheme of allocation of powers, the constitution should indicate clearly what items in the Federal Legislative List should come within the exclusive competence of the federal legislature, and what

items in that list should come within the concurrent field. Of course, the constitution must provide that in case of conflict in the concurrent field, the federal law would prevail over the provincial or State law as the case may be.

I may also state that it would be more satisfactory to split up the proposed federal list of subjects into two parts, the first part grouping all those subjects in regard to which the federal legislature will have exclusive powers of legislation and the second part containing those federal subjects in regard to which the powers of the federal legislature will be concurrent with those of the constituent units.

I have arranged the proposed list of federal subjects under seven broad categories, namely—(1) Defence and External Affairs, (2) Industry, Trade and Commerce; (3) Transport and Communication; (4) Finance and Taxation; (5) Subjects upon which uniformity of laws is desirable; (6) Labour and (7) Miscellaneous. In grouping federal subjects under one or other of the first six categories, no scientific precision is claimed. This classification has been made as it is felt that the discussion of these subjects would be more convenient if they are grouped under broad categories, instead of being scattered in a haphazard fashion. In the Constitutional document, however, no such classification is required, all these subjects being arranged under one section. As I have already suggested, these subjects though brought under one section may be arranged in two groups, the first group containing exclusive subjects, and the second concurrent subjects.

I have indicated at the end of each of these groups, what items in it should be exclusive, and what items should be concurrent.

IV

Defence and External Affairs

(1) The declaration of War and the making of rules concerning captures on land and water.

(2) The provision of the Military, Naval and Air defence of the federation including the conscription of its citizens for that purpose.

(3) Naval, military and air force works, including the acceptance even during peacetime by such works of any contract for the sale to the public of any products it can manufacture, or of any other undertaking for civilian purposes, when such course is deemed necessary to maintain the works in efficient operating condition.

(4) To make rules for the government and regulation of the land, naval and air forces.

These four heads of power may be described as the war powers of the Federal Legislature. These should be reinforced by another provision written into the Constitution running thus: 'No Province or State shall enter into any treaty, alliance or confederation; nor shall any Province or State without the consent of the Federal Legislature, keep troops or ships of war in time of peace nor enter into any agreement or compact with another Province or State or with a foreign power, or engage in war, unless actually invaded or is in such imminent danger as will not admit of delay'. This is based upon Article I, Section 10 of the Constitution of the United States.

It will be noticed that an express provision for the conscription of the citizens of the federation has been made in head two of this list. While it is true that the power to organize the military, naval and air defence of India may be deemed to carry with it the power to conscript citizens for that purpose, I have considered it necessary to put this matter beyond any controversy. In the absence of any express provision, the Indian States may raise a controversy over it. In the United States, when an Act was passed in 1917 by Congress providing that all male citizens between the ages of 21 and 30, with certain exceptions, should be subjected to military service and authorizing the President to select from them

a body of one million men, the validity of the Act was questioned. In the *Selective Draft Law Cases*,[1] Chief Justice White delivering the opinion of the Supreme Court upheld the validity of the Act holding that 'the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it'. It would be well, I think, to make the position in this respect quite clear.

The clause which occurs in head 3, namely 'including the acceptance even during peacetime by such works of any contract for the sale to the public of any products which it can manufacture, or of any other undertaking for civilian purposes, when such course is deemed necessary to maintain the works in efficient operating condition' has been put in by me with a special object. Both Australian and American experience suggests the advisability of making a provision of this kind. For instance, in the case of *Commonwealth* v. *Australian Commonwealth Shipping Board*,[2] the question arose whether the Commonwealth Parliament was competent under its defence power to authorize the Commonwealth Shipping Board in charge of the naval dockyards to accept civilian contracts during peacetime. The Australian High Court ruled that the Commonwealth Parliament had no such power although the Shipping Board might have found it both necessary and convenient, in order to maintain throughout a period of peace the nucleus of a staff for emergency and war purposes, to carry on work for civilian purposes and to enter into contracts with other than Commonwealth Authorities. Having regard to this ruling, the Royal Commission which reported on the working of the Australian Constitution in 1929 suggested an amendment of the defence power of the Commonwealth. In the course of its report the Royal

[1] (1918) 245 U.S., 366.

[2] (1926) 39 C.L.R., 1.

Commission observed as follows: 'Despite the wide scope of the defence power it appears from the Judgment of the High Court in *Commonwealth* v. *Australian Shipping Board*[1] that the Commonwealth Parliament could not confer authority on the Shipping Board to enter, in time of peace, into such a contract as 'the Bunnerong Contract' for doing work at the Cockatoo Island Dockyard for other than Commonwealth Authorities . . . Whatever view may be taken as to the policy of carrying out work for civilian purposes in regard to any matter for which private enterprise provides adequate facilities, we think that the limitation of the defence power referred to above should be removed, and that the Commonwealth Parliament should be empowered to authorize the carrying out of work for civilian purposes where such a course is deemed necessary in order to put Australia in a state of preparation for war or war emergencies.'[2]

The great controversy which arose in the United States with regard to the sale of the surplus electricity developed at the Wilson dam, at Muscle Shoals, in Northern Alabama, by the Federal Government to the public during peacetime, also makes it advisable to have a provision of the kind mentioned above. In 1916, by a congressional statute, the President of the United States was authorized to cause an investigation to be made in order to determine 'the best, cheapest and most available means for the production of nitrates and other products for munitions of war'; to designate for the exclusive use of the United States 'such site or sites upon any navigable or non-navigable river or rivers or upon the public lands, as in his opinion will be necessary for carrying out the purposes of this Act'; and 'to construct, maintain and operate' on any such site 'dams, locks, improvements to navigation, power houses, and other plants and equipment or other means than

[1] (1926) 39 C.L.R. 1.
[2] *Report of the Royal Commission on the Australian Constitution*, p. 267 (1929).

water power as in his judgment is the best and cheapest, necessary or convenient for the generation of electrical or other power and for the production of nitrates or other products needed for munitions of war and useful in the manufacture of fertilizers or other useful products.' The President was authorized to acquire lands for the purpose of the construction and to dispose of any surplus power not required for military or naval purposes. Under the authority conferred by the Act aforesaid, the Federal Government constructed a great concrete monolith called the Wilson Dam at Muscle Shoals on the Tennessee river in Northern Alabama. The construction of the dam was completed in 1926. In 1934, the Tennessee Valley Authority, an agency of the Federal Government, entered into a contract with the Alabama Power Company for the sale by the former to the latter of surplus electrical energy produced at the dam. Influential private interests challenged the validity of this contract contending that it was beyond the powers of the Federal Government. Chief Justice Hughes delivering the opinion of the Supreme Court in the great case of *Ashwander* v. *Tennessee Valley Authority*[1] held that both under the war and commerce powers of Congress the construction of the dam and the auxiliary hydro-electric plants was permissible and that the sale of surplus electrical energy to the public was also competent.

(5) External Affairs: the implementing of treaties, conventions and agreements with other countries.

Under the Government of India Act, 1935, the position of India to implement by legislation treaties and agreements entered into by it with other countries is very anomalous. Section 106, Sub-section (1) of that Act, provides: 'The Federal Legislature shall not by reason only of the entry in the Federal Legislative List relating to the implementing of treaties and agreements with other countries have power to

[1] (1936) 297 U.S., 288.

make any law for any Province except with the previous consent of the Governor, or for a Federated State except with the previous consent of the Ruler thereof.' Sub-section 3 of the same section states that: 'Nothing in this section applies in relation to any law which the Federal Legislature has power to make for a Province or, as the case may be, a Federated State, by virtue of any other entry in the Federal or the Concurrent Legislative list as well as by virtue of the said entry.' The effect of these provisions contained in section 106 is that while the federal executive would be competent to implement by legislation the clauses of treaties and agreements entered into by the federation with other countries so far as they relate to the federal sphere (as defined in the federal and concurrent lists), that executive has to take the previous consent of the governors of the British Indian Provinces and of the rulers of the Federated States before it can give legislative operation to them in so far as they trench upon the Provincial or State sphere. The prospect before the federal executive when it is negotiating treaties and agreements with other countries in the interests of India as a whole, if the present qualification contained in section 106 of the Government of India Act, 1935, continues to be operative even in the future, is none too cheerful. In India where centrifugal tendencies are apt to be rather pronounced, it would be very difficult, if not impossible, to secure the consent of the eleven British Indian Provinces and the five-hundred and sixty-two Indian Principalities to the carrying out of international obligations. The Indian Federal Government of the future must not only be able to speak for India as a whole in its relations with the outside world but be able to implement in the legislative sphere on its own authority obligations incurred by it under treaties negotiated by it with other countries, even though such implementation may involve the invasion of the normal field of the constituent units. Without this authority, the Federal Government would be unable to implement

promises made to other countries and will thus have to face the prospect of reprisals for not carrying out its promises. I would, therefore, suggest that no provision such as that contained in section 106 of the Government of India Act, 1935, should find a place in the future constitution. The head of power, as I have worded it now, would give adequate authority to the Federal Government to implement in the legislative sphere obligations undertaken by it under any treaties, conventions or agreements which it may conclude with other countries. Elsewhere I have examined this question at some length.[1]

Note: All the 5 items in this group should come within the exclusive powers of the Federal Legislature.

V

Industry, Trade and Commerce

(1) The regulation of foreign commerce.

(2) Import and export across customs frontiers as defined by the Federal Government.

(3) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the federation.

This item corresponds to item (iii) of section 51 of the Commonwealth of Australia Constitution Act, 1900. A provision of this kind would be useful either with a view to encourage the establishment of a key industry invaluable at a time of war, say for instance the manufacture of optical goods, precision instruments, or specialized steels by promising bounties on production, or in order to enable any surplus of goods to be exported outside especially during a time of depression on a competitive basis by the grant of bounties.

(4) Major ports, that is to say, the declaration and delimitation of such ports, and the constitution and powers of Port Authorities therein.

[1] See M. Ramaswamy: 'The Indian States in the Indian Federation' in III *University of Toronto Law Journal* (1940) at pp. 314-320.

(5) Development or Nationalization of industries, where development or nationalization under Federal control is declared by Federal law to be expedient in the public interest.

Item 34 of the Federal Legislative list of the Government of India Act, 1935, runs thus: 'Development of industries, where development under Federal control is declared by Federal law to be expedient in the public interest.' I have amended this item to make it clear that the Federal Legislature can direct the nationalization of any industry if such a course is considered expedient in the public interest.

In order to explain the scope of this power, I am reproducing here the comment which I made on this item in my book 'The Law of the Indian Constitution' at pp. 278–279: 'Three things are necessary for the exercise of this power, namely (1) an industry, (2) a desire on the part of the Federation to develop it under Federal control in the public interest, and (3) such desire being expressed in the form of a legislative enactment whereby the nature of the control to be exercised over it will be specified. The words used in this item 'development under federal control' are rather important. The development of an industry under Federal control may merely take the form of assistance given to it by the establishment of a Research Institute to deal with specific problems concerning that industry, or the organization of a department for disseminating useful information relating to it. The development of an industry under Federal control may, it would seem, take place in other ways also. A subsidy Act may be passed by which monetary assistance would be given to any particular class of industry under conditions specified in the Act. The Act may also provide that such concerns as receive subsidies from the Federal Government are liable to be inspected by appropriate Federal authorities and also carry out the instructions—the nature of which will be prescribed in the Act or the rules made thereunder—given to them by those authorities. A question may arise whether the wording

of this item is wide enough to enable the Federation by means of a legislative enactment to nationalize any particular class of industry. The answer to that question seems to be in the affirmative. The Federal control under which the development of an industry is to take place may well be full and exclusive control, that is to say, control to the exclusion of all private, Provincial or State enterprise in that industry, if the Federal Legislature should pass a law that it is expedient in the public interest that the development of that industry should take place under the sole control of the Federation. If that construction is correct, then industries like the Iron and Steel Industry, or the armament industry, could be nationalized under this head of power.'

(6) Regulation of mines and oilfields and mineral development to the extent to which such regulation and development under Federal control is declared by Federal law to be expedient in the public interest.

(7) Regulation of labour and safety in mines and oilfields.

(8) The law of Insurance, but so as not to affect the official Insurance schemes of Provinces or Federated States and also of any public insurance scheme run by a Federated State and carrying on business only within that State.

(9) Banking, that is to say, the conduct of banking business by corporations other than corporations owned or controlled by a Federated State and carrying on business only within that State.

(10) Copyright, inventions, designs, trade marks and merchandise marks.

(11) Cheques, bills of exchange, promissory notes and other like instruments.

(12) Establishment of standards of weight.

(13) Trusts, combines and monopolies.

United States experience suggests the need for the Central Government to keep control over combinations acting in restraint of commerce. The Congress of the United States has,

under its commerce power, enacted various pieces of legislation to control the activities of great corporations which have monopolized commerce and reduced the area of free competition. Notable instances of federal statutes passed by Congress to control and suppress trusts, monopolies and combinations are the Sherman Anti-Trust Act, 1890, and the Clayton Act, 1914. It is quite likely that large industrial combinations will be formed even in India after the present war, with a view to control prices and suppress competition. The Federal Legislature must have adequate power to deal with such combinations, especially when they are exercising undue restraint on free competition and thus harming public interests. This may be made a concurrent power.

(14) The grading and marketing of products.

I think it would be well to provide a separate head of concurrent power with regard to the grading and marketing of products. While in practice the Federation may be expected to deal with the grading and marketing of only those products as entered the channels of foreign and inter-provincial commerce, leaving the grading and marketing of products which have only a local market to the provinces, it would be very unwise to restrict the federal power in the constitution to inter-provincial and foreign phases of the grading and marketing of products alone. Such a course would introduce many of the constitutional difficulties which have been experienced in Canada under the British North America Act, 1867, in attempting to regulate the marketing of natural products. As the Canadian Royal Commission on Dominion-Provincial Relations have observed: 'Under the provisions of the British North America Act, which have already been quoted, the provinces had exclusive legislative power over 'property and civil rights' and local matters within the province, and, therefore, alone could deal with many phases of marketing which were intra-provincial in their scope. The supply of milk to large cities is an example of this type of marketing regulation.

The provinces, however, had no power to legislate concerning inter-provincial and foreign trade, but in this trade the need for uniformity of standards and accuracy of grading may be even more essential than in local trade. Various attempts were made by the Dominion to establish standards and grades but with little success except for wheat. The prime difficulty encountered by both Provincial and Dominion legislation arose from the fact that grading of many products to be effective must take place when the individual producer first sells his produce, but that then it is often impossible to say whether the particular articles will remain in local trade or will pass into interprovincial or export trade. A similar constitutional difficulty was encountered in recent legislation designed to aid producers by enabling them to establish marketing boards financed by the imposition of licence fees. Dominion legislation of this type was held invalid because of its interference with local trade[1]. Provincial legislation of this type was held to be valid,[2] but it is applicable to commodities whose chief market is local and would probably be inapplicable to commodities entering into interprovincial or foreign trade; it might even be possible that provincial legislation which was originally valid would become invalid if the commodity concerned ceased to be merely the subject of local trade and came to be widely sold in foreign markets.'[3]

Most of these constitutional complications can be avoided by the creation of concurrent jurisdiction over grading and marketing and this is what this particular head of power proposes to do. In the case of certain products, local and interstate phases of their circulation may be so closely intermeshed that it may be difficult to draw a line between the two for purposes of local and federal jurisdiction. And the

[1] Re *Natural Products Marketing Act* (1937) A.C., 377.
[2] Re *British Columbia Natural Products Marketing Act* (1937) 4 D.L.R., 298, *Shannon* v. *Lower Mainland Dairy Products Board* (1938) A.C., 708.
[3] *Report of the Royal Commission on Dominion-Provincial Relations* (1940): Book II, p. 54.

grading of many products to be effective must take place when the individual producer first sells his produce, but at that stage, it may be difficult to say whether they will get into local or interstate commerce. In such cases, if the Federal Government has concurrent power, it can step in to control the grading and marketing of such products without being vexed by problems of divided jurisdiction.

If it is felt that the investiture of power in the federation to deal with the grading and marketing of all products would be to encroach upon the autonomy of the units to an unreasonable extent, this head of power may be recast so as to give that authority power over certain definite products only, products which have a large inter-provincial or export sale. And by the process of delegation of jurisdiction, any constituent unit may add designated products to the original list, when it feels that it is better for the federation to deal with the marketing of such products.

(15) Corporations, that is to say, the incorporation, regulation and winding-up of trading corporations, including banking, insurance and financial corporations, but not including corporations owned or controlled by a Federated State and carrying on business only within that State or co-operative societies, and of corporations, whether trading or not, with objects not confined to one unit.

Note.—Items 1 to 12 and 15 in this group will come within the exclusive power of the federation, while items 13 and 14 will come within the concurrent field.

VI

Transport and Communication

(1) Posts and telegraphs, including telephones, wireless, broadcasting, and other like forms of communication: Post Office Savings Bank.

(2) Federal Railways; the regulation of all railways in respect of safety, maximum and minimum rates and fares,

station and service terminal charges, interchange of traffic and the responsibility of railway administrations as carriers of goods and passengers; the regulation of minor railways in respect of safety and the responsibility of the administrations of such railways as carriers of goods and passengers.

Definitions:—

(i) 'Railway' includes a tramway, not wholly within a municipal area.

(ii) 'Federal Railway' does not include an Indian State Railway but, save as aforesaid, includes any railway not being a minor railway.

(iii) 'Indian State Railway' means a railway owned by a State and either operated by the State, or operated on behalf of the State by any other agency other than the Federal Government.

(iv) 'Minor Railway' means a railway which is wholly situate in one unit and does not form a continuous line of communication with a federal railway, whether of the same gauge or not.

(3) Maritime Shipping and navigation, including shipping and navigation on tidal waters; Admiralty Jurisdiction.

(4) Shipping and navigation on inland waterways as regards mechanically propelled vessels, and the rule of the road on such waterways; carriage of passengers and goods on inland waterways.

I shall consider items 3 and 4 together. Item 3 corresponds to item 21 in the Federal Legislative List of the Government of India Act, 1935. Item 4 corresponds to item 32 of the Concurrent Legislative List of the same statute. Following the model of the Statute aforesaid, I suggest that even under the new Constitution item 3 should be made an exclusive power of the federal legislature and that item 4 should come within the concurrent field. The reason for putting these two powers into two separate categories will be mentioned later.

Under section 51 (i) of the Commonwealth of Australia Constitution Act, 1900, the Commonwealth Parliament is competent to make laws with respect to 'Trade and commerce with other countries, and among the States.' Section 98 of the Act provides that the power of that Parliament to make laws with respect to trade and commerce extends to navigation and shipping and to railways the property of any State. The combined effect of sections 51 (i) and 98, so far as shipping and navigation are concerned, according to Australian cases, is, that the power of the Commonwealth to make laws is restricted to navigation and shipping of an overseas or interstate character. See *Huddart Parker and Co. Pty., Ltd.* v. *Moorehead.*[1] As the regulation of navigation and shipping in Australia is not subject to unified control, numerous difficulties of a practical character have arisen in that country. The Royal Commission, which reported in 1929 on the working of the Australian Constitution, have observed as follows at page 151 of their report: 'The Commonwealth Act deals, and can deal only, with interstate and foreign shipping. Intrastate shipping is subject to State laws. Different rules may prevail, therefore, and different conditions may apply to ships engaged in the interstate coastal trade and ships trading solely between the ports of one State. Different conditions may apply to the same ship, according to the voyage which it undertakes, or the waters which it traverses. Different standards may be applied in granting certificates, according as the certificates are to be used in interstate or intrastate trade.' The Royal Commission, after a careful examination of the whole question, made the following recommendations at page 256 of their report: 'In our opinion the requirements for coastal navigation should be the same whether the ships navigated trade between one or more States or along the coast of one State only. Further, we are of opinion that the

[1] (1908) 8 C.L.R., 330: Observations of Griffith, C.J. at p. 352.

administration of the laws relating to navigation should be under one central authority, adequate provision being made for a decentralized administration and the subordinate officers having an adequate discretion. We fully accept the evidence of a number of expert witnesses to the effect that the State and Federal authorities have worked harmoniously, but we think that there should not be the opportunity for friction and for overlapping which must exist under the present method of control. Further, we are of opinion that there should not be any room for the doubts which have arisen as to the laws under which an offence may be punishable, or as to the authority which may appoint courts of inquiry, which have arisen in a number of recent cases referred to by witnesses before this Commission. We recommend that the Commonwealth Parliament be empowered to legislate with respect to navigation and shipping.'

Maritime shipping covers not only shipping on the high seas but also shipping on the territorial waters surrounding the coasts. The power of a sovereign State to control shipping and navigation on its territorial waters, that is to say on the three-mile belt of sea surrounding its coasts is, according to the accepted principle of the law of nations, plenary. The portion of the sea lying along and washing the coasts of a country up to a distance of three miles of the shore is regarded as part of that country itself. According to writers on international law, a sovereign State is competent also to exercise a qualified jurisdiction even beyond the territorial waters for fiscal and defence purposes, that is, for the execution of their revenue laws and to prevent hovering on their coasts. The extent of this permissive jurisdiction does not appear to be limited within clearly marked boundaries.[1] A sovereign country is

[1] See *Travers Twiss*, in his treatise on *International Law* in the volume dealing with Peace at p. 265. A quotation from this appears in the judgment of Lord Macmillan for the Privy Council in the case of *Croft* v. *Dunphy* (1933) A.C., 156.

fully competent to pass laws in respect of ships flying its flag wherever they may be, including the high seas. Of course such extra-territorial jurisdiction will operate subject to local laws while the ships are within the jurisdiction of another country. Having regard to the fact that shipping on the oceans whether within or beyond territorial limits has international aspects, it is only right that the Federal Government should take complete charge of it to the exclusion of the constituent States.

It may also be pointed out that under this exclusive power ships engaged in the Indian Coastal trade whether they operate between ports in a single constituent unit or between ports of two or more such units will come within federal jurisdiction. The administrative and legal difficulties which have arisen in Australia with regard to shipping engaged in the coastal trade owing to the division of jurisdiction between the Commonwealth and States upon this topic are completely avoided under the Indian provision.

As regards shipping and navigation on inland waterways, it is sufficient if a limited concurrent jurisdiction is vested in the federation. Under the suggested concurrent power, the Federal Government may, in its discretion, step in to regulate shipping and navigation on inland waterways as regards mechanically propelled vessels, the rule of the road and the carriage of passengers and goods upon such waterways. As a matter of fact, on most of our rivers only small craft operate and they too are mostly engaged in intrastate trade. Such inland water-borne traffic ought primarily to be a concern of the units. Most of our rivers, moreover, are not navigable by steam-driven or oil-burning ships of even moderate size.

(5) Aircraft and air navigation: the provision of aerodromes; regulation and organization of air traffic and of aerodromes.

Under the Commonwealth of Australia Constitution Act, 1900, there is no one subject in section 51 covering the

general control of civil aviation in the Commonwealth. Under the trade and commerce power, the Commonwealth Parliament may pass regulations in aid of foreign and interstate commerce. Under the Commonwealth power over posts and telegraphs, aviation incidental to these may be regulated by the Commonwealth. But intrastate civil flying comes within State jurisdiction. Of course, under the defence power, military aviation can be controlled by the Commonwealth Government throughout Australia. It seems very desirable that the control over air-navigation and aircraft throughout the federation should be under the exclusive control of the Federal Government. And the present head of power is framed with that object in view.

(6) Carriage of passengers and goods by sea or by air.

(7) Lighthouses, including lightships, beacons and other provisions for the safety of shipping and aircraft.

Note.—Items 1 to 3 and 5 to 7 will be within the exclusive powers of the Federal Legislature. Item 4 will come within the concurrent field.

VII

Finance and Taxation

I would preface the enumeration of the suggested heads of federal power relating to finance and taxation with the observation that in my view the financial and taxation arrangements contained in the Government of India Act, 1935, represent a fair and well-balanced scheme of adjustment of the relations of the Federation and the Units in this important sphere. I would accordingly favour the adoption, with any modifications that may be deemed necessary, of the scheme of federal finance embodied in that Act in the future Constitution of India. I propose enumerating here only the suggested heads of federal power relating to these topics. These heads of power necessarily have to be supplemented by other provisions such as those contained in sections 136 to 171 of the Government

of India Act, 1935. I do not propose to deal with these provisions in any detail; nor am I examining the modifications which may be required in them to adapt them to our requirements. But a passing reference to some of the more important of these will, however, be made. I have examined at length the financial arrangements made by the Government of India Act, 1935, in Chapter XV of my treatise on *The Law of the Indian Constitution.*

1. Currency, Coinage and Legal Tender.
2. Public Debt of the Federation.
3. Duties of Customs, including export duties.
4. Duties of Excise on tobacco and other goods manufactured or produced in India except—

(*a*) alcoholic liquors for human consumption;

(*b*) opium, Indian hemp and other narcotic drugs and narcotics, non-narcotic drugs;

(*c*) medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (*b*) of this entry.

Definition:

A duty of excise means a duty on goods manufactured or produced in India levied on the manufacturer or producer of such goods upon such manufacture or production and does not include a duty on the sale of goods manufactured or produced in India, whether upon a first or subsequent sale of such goods.

5. Corporation Tax.
6. Taxes on income, other than agricultural income.
7. Taxes on the capital value of assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies.
8. Duties in respect of succession to property other than agricultural land.
9. The rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, proxies and receipts.

10. Terminal taxes on goods or passengers carried by railway or air; taxes on railway fares or freights.

11. Duties on salt.

It will be noticed that with respect to item 4 which deals with excise duties, a definition of what constitutes an 'excise duty' is appended to it. The object of adding such a definition is this. Under the scheme of distribution of powers which I have suggested, there will only be one list and that the Federal List. The Provincial Legislative List will disappear completely. Under the Government of India Act, 1935, a special provision was made in item 48 of the Provincial Legislative List for the Provinces to levy 'taxes on the sale of goods'. The import of the term 'duties of excise' is rather indefinite. Mr. Justice Jayakar in the case of *In re the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act*, 1938[1], stated that, but for the reconciliation which was demanded by the existence of two related categories of Federal and Provincial powers, namely 'Duties of excise' in item 45 of List I and 'taxes on the sale of goods' in item 48 of List II of the seventh schedule to the Government of India Act, 1935, he would have defined duties of excise as comprehending 'all duties of excise on goods manufactured or produced in India, whether levied or collected at the stage of manufacture or production or at any of the subsequent stages up to consumption.' This definition of 'duties of excise' would comprehend many types of sales taxes and cut into the taxation powers of the Provinces and States. And if we remember that, in the future, we will be dealing with only one list, namely the Federal List, without any reconciliation being required with another list of provincial subjects expressly providing for 'taxes on the sale of goods' as under the present arrangements, the need for limiting the scope of an excise duty by a precise definition

[1] [1939] F.C.R., 18 at p. 114.

becomes obvious, especially when we wish to preserve to the Provinces and States the power to levy sales taxes. Moreover, even if a restricted meaning is to be given to the term 'Duties of excise' as was done by Chief Justice Gwyer and Sulaiman, J., in the *C.P. Motor Spirit case*, a provincial turnover tax on the first sales of a manufacturer or producer of home-made goods would certainly be held to be *ultra vires* of the Provinces if the term 'Duties of excise' were allowed to stand unqualified in the Federal List. The reasoning of the Australian case of *Commonwealth Oil Refineries, Ltd.* v. *South Australia*,[1] where a State tax at the rate of 3*d.* for every gallon of motor spirit sold by any person, who sold and delivered it within the State to persons within the State for the first time after the production or manufacture, was held to be so connected with production or manufacture, as to come within the purview of an excise duty, would be applicable. It is true that in the recent case of *Madras Province* v. *Boddu Paidanna & Sons*,[2] the Federal Court sustained the validity of the levy of a provincial turnover tax levied on the manufacturer on the first sale of groundnut oil and cake manufactured by him. It is clear from the judgment of Chief Justice Gwyer for the court that that decision largely turned upon the fact that an express provision was made in the Provincial Legislative List for the levy by the provinces of 'taxes on the sale of goods'. As Chief Justice Gwyer pointed out: 'The tax on the sale of goods, which the Act assigns exclusively to the provincial legislatures, is a tax levied on the occasion of the sale of goods. Plainly a tax levied on the first sale must in the nature of things be a tax on the sale by the manufacturer or producer; but it is levied upon him qua seller and not qua manufacturer or producer.'

I am of the opinion that in the new constitutional dispensation the units should retain the power to levy sales taxes

[1] (1926) 38 C.L.R., 408. [2] A.I.R. 1942 Federal Court, 33.

And I have, therefore, added a definition of ' a duty of excise ' which restricts the scope of that term.

A provision similar to that contained in section 140 of the Government of India Act, 1935, will have to be made in the new Constitution providing that Duties on salt, federal duties of excise and export duties shall be levied and collected by the Federation, but that, if an Act of the Federal Legislature so provides, there shall be paid out of the federal revenues to the constituent units in which such duties have been levied, sums equivalent to the whole or any part of that duty to be apportioned among them in accordance with such principles of distribution as may be formulated by that Act.

As regards duties in respect of succession to property other than agricultural land, stamp duties levied on bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, proxies and receipts, and terminal taxes on goods or passengers carried by railway, or air, and taxes on railway fares and freights, which are levied and collected under the authority of federal enactments, a provision will have to be made in the Constitution similar to that contained in section 137 of the Government of India Act, 1935, for the return to the constituent units in which such duties and taxes have been levied, of the net proceeds of such taxes or duties in accordance with such principles of distribution as may be formulated by Act of the Federal Legislature.

Provision will also have to be made for the division of the proceeds of income-tax between the Provinces and Federation upon a stated basis. Section 138 of the Government of India Act, 1935, will serve as a model for devising a plan upon which the division of income-tax revenues should be made.

Note.—All the items 1 to 11 in this group will come within the exclusive powers of the Federal Legislature.

VIII

Subjects upon which Uniformity of Legislation is desirable

Some of the great Indian Law Codes which are in force in British India today like the Indian Penal Code, the Civil and Criminal Procedure Codes, the Transfer of Property Act, the Contract Act and the Evidence Act, are magnificent pieces of constructive legislation. It would indeed be very desirable to preserve the uniformity of laws which these codes have established in British India over so many years, even after the new Constitution begins to work. No false sentiment of provincial rights should be allowed to destroy the great framework of laws built up in the land by assigning the subject-matters of these pieces of legislation to the Provinces. In fact, I would very much favour the Indian States, were they willing to do so, to delegate legislative jurisdiction over matters covered by these codes to the Federation in the India of the future. Even today many of the important Indian States have adopted practically wholesale the various British Indian codes into their own statute books. Part I of the Concurrent list of subjects embodied in List III of the seventh schedule to the Government of India Act, 1935, refers to these topics of legislation. It seems to me that the provision contained in section 107 of that Act with regard to the powers of the Federal and Provincial Legislatures in regard to the concurrent list of subjects and the manner in which federal and provincial laws are to be reconciled in case of conflict is not only very complicated but betrays an undue anxiety to enlarge the powers of the provincial legislatures beyond reasonable limits. Under section 107 federal legislation in the concurrent field can be overridden by provincial legislation, if the provincial law having been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure has

received the assent of the Governor-General or of His Majesty. Although this would not preclude further federal legislation, the section provides that no bill or amendment for making any provision repugnant to any provincial law which, having been so reserved, has received the assent of the Governor-General or of His Majesty, shall be introduced or moved in either chamber of the Federal Legislature without the previous sanction of the Governor-General. The object seems to be to vest a large measure of discretionary authority in the provinces to modify federal legislation upon these subjects to suit their own conditions. I do not believe that federal legislation upon these subjects requires to be modified to any great extent to suit provincial requirements. In the few cases in which provincial conditions demand modifications in federal enactments it is possible for the Federal Acts themselves to provide for them. And, moreover, by a free use of the device of delegating powers to provincial authorities to enact rules, the provinces can be given powers to fill up details suitable to their own needs within the general framework of the Federal Acts. The British Indian Civil Procedure Code is a notable instance of an enactment which, after fixing the general framework of legislation, gives a wide power of rule-making to committees constituted by the Provincial High Courts. I, therefore, think that no special provision such as that contained in section 107 of the Government of India Act, 1935, is necessary in the case of these subjects.

As in the case of the other heads of concurrent power, even with regard to these, the provincial legislatures will have concurrent rights of legislation with the reservation that federal laws will prevail over provincial laws in case of conflict. In the list which I have given below, I am including most of the items which occur in Part I of List III of the seventh schedule, omitting a few whose inclusion seemed to me to be unnecessary. Items 30, 33 and 34 in Part II of

List III of the seventh schedule are included in this list.

(1) Criminal law with respect to all matters included in the Indian Penal Code on the date of the inauguration of the Federation and also in regard to offences against laws with respect of any of the matters in the concurrent group of the Federal list.

(2) Criminal Procedure including all matters included in the Code of Criminal Procedure on the date of inauguration of the Federation.

(3) Removal of prisoners and accused persons from one unit to another unit.

(4) Civil Procedure, including the Law of Limitation and all matters included in the Code of Civil Procedure on the date of inauguration of the Federation; the recovery in an Indian Province or a federal territory of claims in respect of taxes and other public demands, including arrears of land revenue and sums recoverable as such, arising outside that Indian province or federal territory.

(5) Evidence and Oaths; recognition of laws; public acts and records and judicial proceedings.

(6) Marriage and divorce; infants and minors; adoption.

(7) Wills, Intestacy, and succession, save as regards agricultural land.

(8) Transfer of property other than agricultural land; registration of deeds and documents.

(9) Trusts and Trustees.

(10) Contracts, including partnership, agency, contracts of carriage, and other special forms of contract, but not including contracts relating to agricultural land.

(11) Arbitration.

(12) Bankruptcy and insolvency; Administrators-General and official trustees.

(13) Legal, medical and other professions.

(14) Newspaper, books and printing presses.

(15) Poisons and dangerous drugs.

(16) Boilers.

(17) The prevention of the extension from one unit to another of infectious or contagious diseases or pests affecting men, animals or plants.

(18) The sanctioning of cinematograph films for exhibition.

(19) Persons subjected to preventive detention under Federal authority.

(20) Mechanically propelled vehicles.

All the items in this group will come within the concurrent field.

IX

Labour

1. Factories.

2. Welfare of Labour; conditions of labour; provident funds; employers' liability and workmen's compensation; health insurance, including invalidity pensions; Old age pensions.

3. Unemployment Insurance.

4. Trade Unions; industrial and labour disputes.

All the items in this group will come within the concurrent field.

X

Miscellaneous

1. Naturalization, immigration into and emigration and expulsion from India, and pilgrimages to places beyond India.

2. Federal Public Services and Federal Public Service Commission.

3. Federal pensions, that is to say, pensions payable by the Federation or out of Federal revenues.

4. Works, lands and buildings vested in, or in the possession of, the Federation (not being naval, military or air force works), but, as regards property situate in a province, subject

always to provincial legislation, save in so far as Federal law otherwise provides, and, as regards property in a Federated State held by virtue of any lease or agreement with that State, subject to the terms of that lease or agreement.

5. The Imperial Library, the Indian Museum, the Imperial War Museum, the Victoria Memorial, and any similar institution controlled or financed by the Federation.

6. Federal agencies and institutes for the following purposes; that is to say, for research, for professional or technical training, or for the promotion of special studies.

7. The Benares Hindu University and the Aligarh Muslim University.

8. The Survey of India, the Geological, Botanical and Zoological Surveys of India; Federal Meteorological organizations.

9. Ancient and historical monuments; archaeological sites and remains.

10. Census.

11. Port Quarantine; seamen's and marine hospitals; and hospitals connected with Port Quarantine.

12. Fishing and Fisheries beyond territorial waters.

13. Arms; firearms; ammunition.

14. Explosives.

15. Opium, so far as regards cultivation and manufacture, or sale for export.

16. Petroleum and other liquids and substances declared by Federal law to be dangerously inflammable, so far as regards possession, storage and transport.

17. Extension of the powers and jurisdiction of the members of a police force belonging to one province or a Federal territory to any area in another province or a Federal territory, but not so as to enable the police of one part to exercise powers and jurisdiction elsewhere without the consent of the Government of the Province or the Commissioner of the Federal territory, as the case may be; extension of the powers

and jurisdiction of members of a police force belonging to any unit to railway areas outside that unit.

18. Elections to the Federal Legislature, subject to the provisions of the Constitution.

19. The salaries of the Federal Ministers, of the President and Vice-President of the Council of State and of the Speaker and Deputy-Speaker of the Federal Assembly; the salaries, allowances and privileges of the members of the Federal Legislature; and, to such extent as is expressly authorized by the Constitution, the punishment of persons who refuse to give evidence or produce documents before Committees of the Legislature.

20. Salt.

21. State lotteries.

22. Migration within India from or into a Province or a Federal territory.

23. Ranchi European Mental Hospital.

24. Federal territories.

This would cover areas which will be directly administered by the Federation, like the Chief Commissioner's Province of Delhi, Andaman and Nicobar Islands and any other tract which at the time of the Federation will be reserved for federal control, or which other tract may later be acquired by the Federation, by conquest or otherwise.

25. The acquisition of property on just terms from any Province or Federated State or person for any purpose in respect of which the Federal Legislature has power to make laws.

This provision is based upon head (xxxi) of section 51 of the Commonwealth of Australia Constitution Act, 1900.

26. Matters incidental to the execution of any power vested by this Constitution in the Federal Legislature or in either house thereof, or in the Government of the Federation, or in any department or officer of the Federation.

This provision is based upon head (xxxix) of section 51 of the Commonwealth of Australia Constitution Act, 1900.

Although, even in the absence of an express provision regarding the exercise of incidental powers, such powers might have been exercisable, it would, I think, be safer to have a specific provision dealing with this matter in the Constitution.

27. Offences against laws with respect to any of the matters in the exclusive group of the Federal List.

I have included offences against laws with respect to any of the matters in the concurrent group of the Federal List in head 1 of the Uniformity of Laws group. Although the incidental power in item 26 of this group will probably cover item 27 also, I have considered it advisable to make a specific provision.

Note.—All the 27 items in this group will come within the exclusive powers of the Federal Legislature.

XI

Control of Famine

The acute shortage of foodstuffs which exists in some parts of India today and the mounting loss of human life and misery which it has entailed raises important questions as to the responsibility and powers of the Central Government to deal with an emergency of this character. The serious situation which has now arisen in the country is primarily due to the cutting off of supplies from external sources such as Burma and the demands made by the colossal military machine which has come into existence because of war conditions. That the Central Government, under the Government of India Act, 1935, is equipped with adequate powers to devise its own controls to deal with such a situation, even though the operation of such controls might involve the invasion of the provincial sphere, seems to me to be beyond cavil or controversy. The authors of that Act, foreseeing the difficulty of maintaining a strict demarcation of powers under the stress of war conditions, created machinery under section 102 of the

Act to deal with any abnormal situation which may arise during wartime, although the action sought to be taken involved trenching upon the sphere of the constituent units. I have no doubt that the Government of India even as at present constituted and empowered has full powers to commandeer foodstuffs and promulgate price control measures in surplus provinces.

Under the defence powers which I have proposed for the future Indian Federal Government, there could be no doubt that the Centre would be quite competent to deal during wartime with a famine situation in any part of the country, by putting into operation its own measures of control. As we have already seen in Chapter I, while discussing the powers of the Central Governments of the United States, Australia and Canada during wartime, those Governments have plenary powers to take any and every action as will conduce to the efficient prosecution of war. If we limit the consideration to a case of famine when India is at war, the defence powers of the Federation read in conjunction with the incidental power would be found quite adequate.

The question however arises as to whether it is necessary to arm the Indian Federal Centre with powers to deal with famine conditions when the country is at peace. When conditions remain peaceful, I think, it would be very rare indeed for any Indian province or State to find itself so helpless or incapable as not to be able to deal with any famine conditions which may arise in its territory owing to the failure of rains or because of extraordinary causes like earthquakes or floods. If there is a failure of crops in one unit of the Federation, help can reach it from some other unit or even from a foreign source. Having regard to the efficiency and expedition of modern transport, there is no fear, during peacetime, of any portion of India being cut off from external or internal sources of supply. And the organization of relief must be the concern of the unit concerned and not of the centre. But there may

arise situations, though they may be very rare, when federal intervention may become imperative. For instance, although India may not be at war, neighbouring countries which were supplying foodgrains to certain deficit areas in India may themselves be involved in war or be in the zone of war and the external supply may be cut off. And a surplus Province or State may be unwilling to part with its produce unless exorbitant prices are paid. In such an emergency, the centre must be able to commandeer grains from the surplus unit for distribution in deficit areas. It is also possible that some small unit of the Federation—say a small Indian State—may become so impoverished owing to failure of crops over a number of years, that it finds it difficult to cope with the famine situation. Even in such a case, the centre, unless the situation demands it, may not intervene directly in the administration of the unit, but give every assistance necessary to bring matters to normal. The possibility of situations such as those mentioned above arising, though rarely, however, exist. And I think it would be wise to equip the Federal Government with power to take such action as it deems necessary to deal with such situations. And this object would, I think, be secured by giving a concurrent power to the Indian Federal Centre over 'Famine'. The head of power may simply run as 'Famine' so that the Centre might be able to exercise plenary authority, if and when necessary.

XII

Delegation of Legislative Powers

The Canadian Royal Commission on Dominion-Provincial relations in the course of their report recommended that, in order to introduce a certain measure of flexibility in the Canadian Federal System, the British North America Act, 1867, may be amended, so as to enable a Province to delegate power over a matter within its competence to the dominion

and *vice versa*. They observed: 'We think that the introduction of a measure of flexibility in the Canadian Federal System should be considered. A number of provinces may on occasion be willing and may even actively desire the Dominion to assume responsibility for a function which is beyond its constitutional powers. The Dominion may itself be willing to assume the function but be unable to do so until public opinion has developed to the extent of permitting a constitutional amendment to be made. On the other hand, the Dominion may be alone entitled to perform functions which, under modern conditions, it may be more appropriate for the Provinces to perform and certain of the Provinces may be anxious to assume such responsibility. In several submissions to us, it was suggested that it would be desirable to allow a Province to delegate power over a subject to the Dominion, provided that the Dominion was willing to accept the delegation, and conversely that there might be a delegation of power by the Dominion to a Province. The effect of such delegation would be that the delegating authority would divest itself, at least for a limited period, of the power as completely as if it had been assigned to the other authority in the British North America Act. At the present time, although the law is not entirely clear, it seems that delegation of legislative power either by the Dominion to a Province, or by a Province to the Dominion is invalid. To establish definitely a power of delegation which is sufficiently wide, amendment of the British North America Act would be required. Such an amendment should cover both the power to delegate jurisdiction and the power to receive jurisdiction by delegation. It should also be provided that the act of delegation would only be operative if the legislative unit to which delegation was made signified its willingness to accept it. Provision should also be made permitting delegation to be either in perpetuity or for a definite time limit. The Dominion, for example, might be unwilling to accept the delegation

of certain functions involving extensive organization (such as non-contributory old age pensions) unless it were assured that the delegation would operate in perpetuity. For other functions (such as the grading of natural products) it might be sufficient if there were assurance that the delegation would not be revoked for a stipulated period of ten or fifteen years. It should also be provided that although an agreement of delegation could not be revoked by the unilateral action of either legislature during the life-time of the agreement, it might be terminated earlier with the consent of both parties expressed by appropriate legislation. Subject to such restrictions, we can see no reason why a mutual power of delegation between the Dominion and a Province should not be permitted on a temporary as well as a permanent basis . . . . With such a power desirable changes in the constitutional allocation of powers could be effected in respect of one Province without the necessity of waiting for such a development of public opinion as would permit of a nation-wide constitutional amendment. A change in jurisdiction might be effected on a temporary basis for one Province, which, if it proved successful, might induce other Provinces to make similar arrangements, and if unsuccessful need not be a permanent arrangement as would be a constitutional amendment.' [1]

I am greatly impressed with the reasons which the Canadian Royal Commission on Dominion-Provincial Relations have given not only with regard to the need to make a provision in the Constitution for the delegation of power by the Provinces to the Dominion and by the Dominion to the Provinces but also in regard to the exact form the relevant constitutional provision should take. Five important points in this connection require to be noticed, namely: (1) that the Delegation of power may be from the Provinces to the Dominion

[1] *Report of the Canadian Royal Commission on Dominion-Provincial Relations* (1940), Book II, pp. 72–73.

or *vice versa*, (2) that delegation can take place only if the authority to whom power is delegated is willing to accept responsibility for the delegated function; (3) that the constitutional provision will have to be so worded as to permit of delegation for a definite period of time, if permanent delegation of power is considered unsuitable; (4) that one or more Provinces may invest the Dominion with jurisdiction over any matter instead of waiting for the other provinces also to act in the same way and (5) that the delegation which may be for a definite period may be terminated by mutual consent of both parties even during the lifetime of the agreement, although unilateral action on the part of one party alone would not revoke the delegation.

I would suggest that a provision permitting delegation of power from the Federation to the constituent units and *vice versa* framed on the lines suggested by the Royal Commission on Dominion-Provincial Relations may be embodied in the future Constitution of India.

XIII

The Residuary Powers of the Constituent Units

Now it may be asked what is the residuum of authority which is left to the units under the plan of allocation of powers sketched above. Speaking in broad terms, it may be stated that the units will have authority to deal with the following, among other important matters, namely, lands including rights in and over land, land tenures, the relationship of land-lord and tenant; forests; education; public health (except what is ancillary to federal subjects like Port quarantine, immigration and emigration, and military, naval and air forces); hospitals and dispensaries; corporations with provincial objects, cooperative societies; law and order; prisons and reformatories; roads, bridges and ferries; irrigation; water storage and water-power; fisheries; agriculture; land revenue;

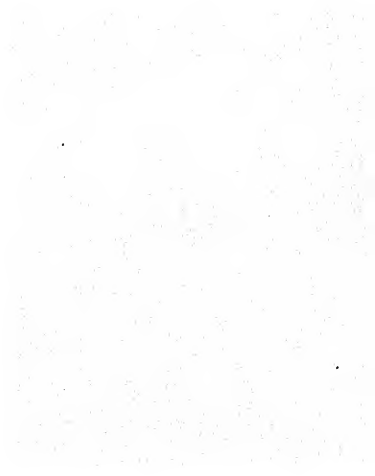
alcoholic excises; sales taxes; taxes on agricultural income; tolls; taxes on professions and callings. These do not, of course, exhaust the subjects which will come within the residuary power of the units. In the case of the Indian States, the residuary field is likely to be wider than what it would be in the case of the provinces. Having regard to the wide sweep of authority still left to the constituent units making all allowance for the powers assigned to the federation, I would venture to submit that, under the plan of allocation suggested above, the content of Provincial and State autonomy would be very substantial indeed. The Provinces and States will be in charge of activities most vital to the life of the people under their care. They are free to plan their educational systems in any manner they like. They can run their own hospitals and dispensaries catering to both human beings and animals. They can construct irrigation-works and hydro-electric projects, establish industries and public utility works and thus make a material contribution to the economic weal of their citizens. They can organize their agriculture on a scientific basis, remodel their land tenures, and promote schemes for the control of agricultural pests and diseases. If the financial resources which will be at the disposal of the constituent units under the arrangements proposed are properly marshalled and utilized, there will be adequate funds available to meet the responsibilities which will devolve upon them. The constituent units will thus be free within this political framework to organize many beneficent activities in harmony with their own economic and cultural environments.

XIV

Summing Up

There are few countries in this world which can display so impressive an array of human and material resources as India. With these resources properly organized, this country can be

one of the fairest lands of this earth. And I can think of no form of political organization more suited to India than a federation. It is the only technique I know of by which national unity and regional autonomy can both be safeguarded by a process of adjustment. But as the Canadian Royal Commission on Dominion Provincial Relations have pointed out, 'national unity and provincial autonomy must not be thought of as competitors for the citizen's allegiance' but as 'two facets of the same thing—a sane federal system'. And I venture to submit that the plan which I have drawn up with regard to the allocation of powers between the federation and the units will go a long way to establish in India a sane and workable federal system.



INDEX

A

Aircraft and air navigation, powers of Indian Federal Legislature over, 54-5
Allocation of Legislative Powers :
  two methods are open in regard to, 1
  allotment of specific subject-matters to the Indian Federal Legislature recommended, and reasons for it, 1-2
  a single federal legislative list divided into two groups, namely exclusive and concurrent groups, suggested, 38-9
American Civil War, reasons for, 12-4

B

Banking, 47
Baroda, 36
Basic problems connected with the establishment of a federation in India :
  ensuring of the freedom of internal commerce, 33-5
  equipment of the centre with plenary power over foreign commerce, 35-8
  equipping the centre with adequate power over defence, 33
  unified postal system, 38
  uniform coinage and currency, 38
Bills of Exchange, Cheques, etc., 47
Bounties, grant of, on production and export of goods, by Federation, 45
British North America Act, 1867 :
  anxiety of the framers of, to provide for a strong central government, 16-8
  general residuary power of Dominion Parliament, present position, discussed, 14-22
  plan of distribution of powers under, 14-22

C

Carnarvon, Lord, on the British North America Bill, 17-8
Clayton Act, 1914, 48
Commonwealth of Australia Constitution Act, 1900 :
  concurrent powers of Commonwealth Parliament under, 7-8
  conflict between Commonwealth and State laws in concurrent field, how resolved, 7-8
  exclusive powers of Commonwealth Parliament under, 6-7
  plan of distribution of powers under, 6-8
  position of Commonwealth Government under, 23-7
Conscription of citizens, power of Indian Federal Legislature over, 40-1

D

Defence powers of Indian Federal Legislature, 39-43
Delegation of Legislative powers :
  from the Federation to the Units and vice versa, necessity of provisions relating to, 68-70
  scope of the provisions to be incorporated into the Indian Constitution with respect to, considered, 70-1
Distribution of Legislative powers :
  two methods of, 1
  the plan of, suggested as suitable for India, 1-2
  under the Government of India Act, 1935, 2-5
  under the Commonwealth of Australia Constitution Act, 1900, 6-8
  under the British North America Act, 1867, 14-22

E

Excise duties :
  leviable by Federation, 56
  leviable by units, 56
  need for a definition of what constitutes an excise duty considered, 57-9
  distribution of, leviable by Federation, to units where levied, 59
External Affairs, powers of Indian Federal Legislature over, 43-5

F

Famine, control of, 66–8
Federal Government, position of, under United States Constitution, 27–9
Finance and Taxation, powers of Indian Federal Legislature over, 55–9

G

Garran, Sir Robert, on the entrustment of specific powers to the Federal Centre, 9
Grigg, Sir James, on customs agreements with Indian maritime States, 35–6

H

Hoare, Sir Samuel, observations of, in Parliament, on the Indian plan of distribution of powers, 3
Hyderabad, 38

I

Incidental powers of Indian Federation, 65–6
Industry, Trade and Commerce, powers of Indian Federal Legislature over, 45–50
Insurance, 47

J

Junagadh, 36

K

Kennedy, Professor W. P. M., on the Canadian Dominion residuary power, 21

L

Labour, powers of the Indian Federal Legislature over, 63

M

Macdonald, Dean Vincent C., observations of, on the declension of the Canadian Dominion residuary power, 12
Macdonald, Sir John A., on the Canadian plan of allocation of powers, 10–11
McLaughlin, Mr. Andrew C., on the movement of the southern States for secession from the American union, 14
Maritime Indian States, the position of, in the future federal polity, a suggested solution, 37–8
Marketing and grading of products:
  necessity of making specific provision for the control of, by Indian Federal Legislature, discussed, 48–50
  power over a few specified products may be given, as an alternative, if a wide federal power is considered unsuitable, 50
Miscellaneous subjects, power of Indian Federal Legislature over, 63–6
Morvi, 36

N

Nationalization of Industries, power of Indian Federal Legislature over, 46–7
Nawanagar, 36
Nicholas, Mr. H. S., observations of, on the vesting of residuary powers in units, 23–4

P

Porbandar, 36
Posts and Telegraphs, 50

R

Railways, 50–1
Residuary powers:
  of the constituent units of Indian Federation under plan of allocation of powers suggested, 71–2
  the mistaken impression that the vesting of residuary powers in the units affects the strength of the Federation, 9–10
  how this impression came to be formed, 10–14
Royal Commission on the Australian Constitution, 32, 41, 52
Royal Commission on Dominion-Provincial relations (Canada), 32, 48, 68, 70, 73

S

Sales taxes, levy of, by units, 57–9
Sherman Anti-trust Act, 1890, 48
Shipping and Navigation (Maritime and upon inland waterways), 51–4

Subjects upon which uniformity of legislation is desirable, considered, 60–3

T

Tennessee Valley Authority, 43
Transport and Communication, powers of Indian Federal Legislature over, 50–5
Treaties, conventions and agreements, powers of Indian Federal Legislature to implement provisions of, 43–5
Trusts, Combines and Monopolies, necessity of making provision for the federal control of, in the future Indian Constitution, 47–8

U

Uniformity of laws group, in the proposed Indian Federal list of subjects, 60–3

W

Wilson dam, Northern Alabama, 42, 43

TABLE OF CASES

A

Amalgamated Society of Engineers *v.* Adelaide S.S. Co., Ltd., (1920) C.L.R. 129, 26

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B

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C

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F

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H

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J

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L

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M

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N

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R

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T

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